

R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

WITH TABLES OF THE NAMES OF CASES, AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.



*Si quid novisti, rectius istis,
Candidus imperti; si non, his utere mecum.*

HOR.

VOL. VI.

Containing the Cases of HILARY, EASTER, and TRINITY Terms,
In the 45th Year of GEO. III. 1805.

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1814

J U D G E S
OF THE
COURT OF KING'S BENCH,

During the Period of these Reports.

EDWARD Lord ELLENBOROUGH, C. J.

Sir NASH GROSE, Knt.

Sir SOULDEN LAWRENCE, Knt.

Sir SIMON LE BLANC, Knt.

ATTORNEY-GENERAL,

The Honourable SPENCER PERCEVAL.

SOLICITOR-GENERAL,

Sir VICARY GIBBS, Knt.

A
T A B L E
OF THE
CASES REPORTED
IN THIS SIXTH VOLUME.

* * * Those Cases which are printed in *Italics* were cited from
MS. Notes.

	PAGE		PAGE
<i>ALDER, Hopes v.</i>	16	Caulfield, Chambers <i>v.</i>	244
Altrec <i>v.</i> Scutt	476	Chambers <i>v.</i> Caulfield	<i>ib.</i>
Anderson, Parr <i>v.</i>	202	Chiffench, <i>Ex parte</i>	347
Atkinson, Liverpool Co. <i>v.</i>	507	Clarke <i>v.</i> Gray	564
Aveson <i>v.</i> Kinnaird, Lord	188	Clayton, Roe <i>v.</i>	628
		<i>Close v. Waterhouse</i>	523
		Cocks <i>v.</i> Harman	404
<i>Badcock, Rex v.</i>	359	Coggan, Rex <i>v.</i>	431
Bayntun, Dewey <i>v.</i>	257	Cooke, Harvey <i>v.</i>	220
Bealey <i>v.</i> Shaw	208	<i>Cooke v. Sayer</i>	388
Bedford Level Corporation, Rex <i>v.</i>	356	Cole <i>v.</i> Gower	110
<i>Bembridge, Rex v.</i>	136	Copestake, Doe <i>v.</i>	328
Bentinck <i>v.</i> Dorrien	199	Cowell <i>v.</i> Watts	405
Berkeley, Roe d. Earl of, Archbishop of York <i>v.</i>	86	<i>Cox v. Godsalue</i>	604
Bowes, Jacob <i>v.</i>	312	Crosby <i>v.</i> Wadsworth	602
Bradley, Prigmore <i>v.</i>	314		
Brocke, <i>Ex parte</i>	238	Darbishire <i>v.</i> Parker	3
Bromley, Henfree <i>v.</i>	309	Davies, M'Combie <i>v.</i>	538
<i>Broughton, Rex v.</i>	587	Dewey <i>v.</i> Bayntun	257
		Diston, Bailiffs of Tewkesbury <i>v.</i>	438
		Dixon, Stable <i>v.</i>	163
Cameron, Tower <i>v.</i>	413	Doe <i>v.</i> Copestake	328
Capp <i>v.</i> Topham	392	— d. George <i>v.</i> Jesson	80
Carr <i>v.</i> Errol, Earl of	58	— <i>v.</i> Micklem	486
			Doe

	PAGE		PAGE
Doe d. Gill v. Pearson	173	Hopkins v. Lloyd.....	355
— v. Smith	530	Hughes v. Hughes	<i>ib.</i>
— d. Strickland v. Spence	120		
— v. Trussell	505	Jacob v. Bowes.....	312
Dorrien, Bentinck v.....	199	James, Salvin v.	571
Duke of Leeds, Rex v.	432	Jesson, Doe d. George v.	80
		Imber, Forty v.....	434
Egerton v. Mathews.....	307	Johnson Justice, Rex v.	583
English v. Purser	395	Jolly v. Walker.....	205
Errol, the Earl of, Carr v.	58	Ireland, Welch v.	613
Ex parte Brocke	138	Judin, Samuel v.	333
— Chiffench.....	347		
		King v. Fraser	348
Fisher, Perry v.	549	Kinnaird, Lord, Aveson v.	188
Fletcher v. Wilkins	283		
Flight, Sodergren v.	614	Lawrence v. Sydebotham.....	45
Forty v. Imber	434	Leeds, Duke of, Rex v.	432
Fraser, King v.....	348	Le Mesurier v. Vaughan	382
		Lewis d. Ormond v. Waters.....	336
George, Doe d. v. Jesson.....	80	Lickbarrow v. Mason	20
Gill, Doe d. v. Pearson	173	Liverpool Company v. Atkinson ..	507
Glover, Hodgson v.	316	Lloyd, Hopkins v.	355
Godsalve, Cox v.	604	Lord Kinnaird, Aveson v.	188
Goodtitle v. Miles.....	494		
Gower, Cole v.	110	M'Combie v. Davies	538
Gowland, Scurfield v.	241	Macfadzen v. Olivant	387
Gray, Clarke v.....	564	Martin v. Smith	555
Gray, Marsden v.	<i>ib.</i>	Marsden v. Gray	564
Griffin, Wild v.	114	*Mason, Lickbarrow v.	20
		Mathews, Egerton v.	307
Hadfield, Rushforth v.	519	Meyer, Hanson v.....	614
Hall v. Molineaux.....	385	Micklem, Doe v.	486
Hanson v. Meyer	614	Miles, Goodtitle v.	494
Harpley, Liverpool Co. v.	507	Mills, Moss v.	144
Harman, Cocks v.	404	Molineaux, Hall v.	385
Harrison v. Parker	154	Moors, Rex v.	419
Harvey v. Cooke	220	Mortlake, Inhabitants of, Rex v.	397
Harvey, Wootton v.....	75	Moss v. Mills	144
Henfree v. Bromley	309	Munton, Rex v.	590
Hilton v. Shepherd	14		
Hodgson v. Glover	316	Neild, Rex v.	417
Hopes v. Alder	16	Newson v. Thornton	17
		Northwick, Lord, v. Stanway....	56
			<i>Oddie,</i>

TABLE OF THE CASES REPORTED.

vii

	PAGE		PAGE
<i>Oddie, Tummer v.</i>	200	<i>Roe d. Earl of Berkeley v. Archbishop of York</i>	86
<i>Olivant, Macfadzen v.</i>	387	<i>Roe v. Clayton</i>	628
<i>Orion Ship, case of</i>	232	<i>Russell, Rex v.</i>	427
<i>Parker, Darbishire v.</i>	3	<i>Rushforth v. Hadfield</i>	519
——, <i>Harrison v.</i>	154	<i>Ryder, Rex v.</i>	587
<i>Parr v. Anderson</i>	202	<i>Saint John Maddermarket, in Nor-</i>	
<i>Pearson, Doe d. Gill v.</i>	173	<i>wich, &c. Rex v.</i>	182
<i>Perry v. Fisher</i>	549	<i>Salvin v. James</i>	571
<i>Phillips, Prescott v.</i>	213	<i>Samuel v. Judin</i>	333
<i>Phillips, Rex v.</i>	464	<i>Sayer, Cooke v.</i>	388
<i>Powell, Rex v.</i>	136	<i>Scurfield v. Gowland</i>	241
<i>Prescott v. Phillips</i>	213	<i>Scutt, Altree v.</i>	476
<i>Price, Rex v.</i>	323	<i>Shaw, Bealey v.</i>	208
—— <i>v. Woodburne</i>	433	<i>Shepherd, Hilton v.</i>	14
<i>Prigmore v. Bradley</i>	314	<i>Siffken v. Wray</i>	371
<i>Purser, English v.</i>	395	<i>Skone, Rex v.</i>	514
<i>Regula Generalis</i>	2	<i>Smith, Doe v.</i>	530
<i>Rex v. Badcock</i>	359	<i>Smith, Martin v.</i>	555
<i>Rex v. Bedford Level Corporation</i>		<i>Sodergren v. Flight</i>	612
.....	336	<i>Southerton, Rex v.</i>	120
—— <i>v. Bembridge and Powell</i>	136	<i>Spence, Strickland, Doe d. v.</i>	123
—— <i>v. Broughton</i>	587	<i>Stable v. Dixon</i>	166
—— <i>v. Coggan</i>	431	<i>Stanway, Lord Northwick v.</i>	56
—— <i>v. Johnson, Justice</i>	583	<i>Strickland, Doe d. v. Spence</i>	120
—— <i>v. Leeds, Duke of</i>	432	<i>Swinton, Willoughby v.</i>	550
—— <i>v. Moors</i>	419	<i>Sydebotham, Lawrence v.</i>	45
—— <i>v. Mortlake, Inhabitants of.</i> ..	397	<i>Tewkesbury, Bailiffs of, v. Diston</i>	
—— <i>v. Munton</i>	590	438
—— <i>v. Neild</i>	417	<i>Thornton, Newson v.</i>	17
—— <i>v. Phillips</i>	464	<i>Throgmorton d. Woodby v. Whelpdale</i>	
—— <i>v. Price</i>	323	123
—— <i>v. Reynell</i>	315	<i>Topham, Capp v.</i>	392
—— <i>v. Ryder</i>	587	<i>Toulmin, Walsh v.</i>	541
—— <i>v. Russell</i>	427	<i>Tower v. Cameron</i>	413
—— <i>v. Saint John Maddermarket, in</i>		<i>Trussell, Doe v.</i>	505
<i>Norwich, Churchwardens, &c.</i>		<i>Tummer v. Oddie</i>	202
.....	182	<i>Vaughan, Le Mesurier v.</i>	382
—— <i>v. Skone</i>	514	<i>Vaughan, Whitehead v.</i>	523
—— <i>v. Southerton</i>	126		
—— <i>v. Woodward</i>	133		
<i>Reynell, Rex v.</i>	315		
<i>Roach v. Wadham</i>	289		

Wadham,

	PAGE		PAGE
Wadham, Roach v.	289	Wild v. Griffin	114
Wadsworth, Crosby v.	602	Wilkins, Fletcher v.	283
Walker, Jolly v.	205	Willoughby v. Swinton	550
Walsh v. Toulmin.	541	Woodburne, Price v.	433
Waterhouse, Close v.	523	Woodward, Rex v.	133
Waters, Lewis d. Ormond v.	336	Wootton v. Harvey	75
Watts, Cowell v.	405	Wray, Siffken v.	371
Welsh v. Ireland	613		
Whelpdale, Throgmorton d. Woadby v.	123	York, Archbishop of, Roe d. Earl of	
Whitehead v. Vaughan	523	Berkeley v.	86

C A S E
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term,

In the Forty-fifth Year of the Reign of **GEORGE III.**

IN the course of this Term, Sir **BEAUMONT HOTHAM**, Knt. one of the Barons of the Court of Exchequer, resigned his Office ; and was succeeded by Sir **THOMAS MANNERS SUTTON**, Knt. his Majesty's Solicitor General, who was thereupon called *Serjeant* ; and gave rings with this motto, *Hic ames dici Pater atque Princeps*.

VICARY GIBBS, Esq. one of the King's Counsel, and who was also Chief Justice of *Chester*, and Attorney General to his Royal Highness the Prince of *Wales*, resigned his two last-mentioned offices, and was appointed Solicitor General to his Majesty, and was knighted.

ROBERT DALLAS, Esq. one of the King's Counsel, was appointed Chief Justice of *Chester*.

WILLIAM ADAM, Esq. who was before Solicitor General to the Prince of *Wales*, succeeded Mr. *Gibbs*, as his Royal Highness's Attorney General ; and

JOSEPH JEKYLL, Esq. was appointed Solicitor General to the Prince ; and afterwards, one of his Majesty's Counsel, learned in the Law.

1805.

REGULA GENERALIS.

Hilary Term, 45 Geo. III.

* The granting of day rules to prisoners in the K. B. prison during term, is in the discretion of the Court on application, the same is before 1^o 30 Geo. 3, but prisoners out upon such day rules must return at or before 9 o'clock in the evening.

WHEREAS, by a Rule made in *Easter Term*, in the 30th *Geo. 3*, it was, amongst other things, Ordered, "That no prisoner in the King's Bench Prison, or within the rules thereof, should have, or be entitled to have, day-rules above three days in each term." And by another rule, *Michaelmas, 37 Geo. 3*, it was further Ordered, "That, notwithstanding the said thereby in part recited rule, if any person in the King's Bench Prison should thereafter state, by affidavit, any special cause, to the satisfaction of this Court, for having an additional day-rule or day-rules beyond those allowed by the aforesaid rule, such additional rule or rules should be granted accordingly for any day or days ensuing such application." It is hereby Ordered, That so much of the said first-mentioned rule as is above recited, and that the whole of the said last-mentioned rule, be repealed and discharged; but that nothing herein contained shall extend to repeal or discharge so much of the said first-mentioned rule as requires That every prisoner, having a day-rule, shall return within the walls or rules of the said prison at or before nine o'clock in the evening of the day for which such rule shall be granted.

By the Court.

[3]

*Thursday,
Jan. 24*

DARBISHIRE and Another *against* PARKER.

Where notice of the dishonour of a bill of exchange by the acceptor in London,

THE Plaintiff declared upon a special agreement by the Defendant, to guarantee the payment of certain goods, which, on the faith of such guarantee, they sold and delivered by the post to the holder in Manchester, where the letter was delivered out between 8 and 9 o'clock in the morning, and the post went out for Liverpool, where the drawer lived, between 12 at noon and 1, and the holder did not send notice to the drawer by the post, either of the same day or the next, but sent it in a letter by a private person on the latter day, who did not deliver it to the drawer till two hours after the post delivery, and only about one hour before the post left Liverpool for London, whereby the drawer was so agitated, that he could not write in time for that day's post to London,—held, that at all events the holder had made the bill his own by his laches, for whether reasonable notice be a question of law or of fact, or whether the general rule of law require notice of the dishonour of a bill to be sent to a party living at another place by the next post after it is received (by which must be understood the next practicable post, in point of time and distance); and whether four hours between the coming in and going out of the post be a sufficient interval, in point of practical convenience, to receive the notice and to prepare a letter of advice to the drawer, at all events, the holder ought to have written by the post of the next day after notice received by him, and ought not to have delayed the receipt of notice by the drawer until after the arrival of the next post, by sending the letter by a private hand.

vered

vered to the value of 250*l.* to certain traders, of the name of *S. E. Parker* and Co.; and which were averred not to have been paid for: to which the general issue was pleaded. At the trial before Lord *Ellenborough*, C. J. at the sittings at *Guildhall*, it appeared that the plaintiffs were manufacturers, living at *Manchester*: that the defendant lived at *Liverpool*; and guaranteed to the plaintiffs the payment of the goods furnished by them to Messrs. *Parker* and Co. who also lived at *Liverpool*: that these latter, after some excuses and delays, sent to the plaintiffs, by way of payment for the goods furnished by them, a bill, drawn by one of the firm of *Parker* and Co. upon a person of the name of *Jackson*, living in *London*, and accepted by him; which bill was dated 6th of *June*, 1803, and made payable to the plaintiffs two months after date, who indorsed it to certain bankers in *Manchester*, in order to obtain payment, who sent it to *London* accordingly: and the sole question was, Whether the plaintiffs had afterwards made the bill their own by laches? As to which the facts were, That the bill, which became due the 9th of *August*, was, on that day, presented for payment to the acceptor in *London* by the banker's agent, and refused payment, and noted accordingly; and notice thereof transmitted, with the bill, to the plaintiffs by the post of the 10th; which arrived at *Manchester* about midnight of the 11th; and the letters were delivered out as usual, between eight and nine in the morning of the 12th. The post leaves *Manchester* for *Liverpool* between twelve at noon and one o'clock. The plaintiffs, however, did not send notice of the dishonour of the bill, either by the post of that day, or by the post of the next, which was the 13th: but they sent the bill with such intelligence by a private hand; by which it was delivered to the drawer at *Liverpool* on the 13th, about nine o'clock in the evening; which was two hours after the time when it would have arrived by the post of that day from *Manchester*, the distance between the two places being about 37 miles. The post leaves *Liverpool* for *London* between nine and ten o'clock in the evening. The drawer, having received notice of the dishonour at *Liverpool* not much above an hour before the post departed for *London*, was so much agitated that he could not get his letter of advice to his correspondent in *London* ready that night; and

1805.

DARBISHIRE
against
PARKER.

[4]

1905. did not send it till the next. It did not, however, appear
 ——— that the acceptor had any funds of the drawer's in his hands,
 DARBISHIRE or that the drawer had in fact received any detriment from
against the delay of the notice to him. Lord *Ellenborough*, C. J.
 PARKER. considering the question of reasonable notice as compounded
 of law and fact, left the whole to the jury; advising them
 that it was not necessary, in his opinion, for a person to
 leave all other business and attend solely to one transaction;
 but they were to consider whether, upon the whole, reasonable
 dispatch had been used by the plaintiffs, in communicating
 [5] notice of the dishonour of the bill to the drawer.' That the
 few hours which intervened between the delivery of the letter
 of advice to them at *Manchester* on the 12th and the going
 out of the post on that day for *Liverpool*, might, he thought,
 excuse them, having other affairs to attend to, from not
 writing by that post,—there being no evidence of the exact
 time when the letter came to their hands; and that, if they
 had the next day to send notice, it seemed that they had
 the whole of that day, in the course of which they had sent
 intelligence by a private hand to *Liverpool*, in time, as it
 appeared, for the drawer to have written by that night's post
 to *London*, had not his agitation delayed him. The jury
 found a verdict for the plaintiffs: to set aside which, a rule
nisi was granted in the last term, which was applied for on
 the ground that reasonable notice was a question of law;
 and that the law required, where the parties lived in dif-
 ferent places, that notice of the dishonour of a bill should
 be sent by the next post: that here the next post went out
 on the same day the letter of advice reached the plaintiffs
 at *Manchester*; but that at any rate they had been guilty of
 laches in not sending notice by the post of the 13th; but
 trusting to a private hand, which delayed the delivery of it
 too late for writing to *London* by the post of the 13th from
Liverpool.

Erskine and *Richardson* shewed cause against the rule;
 and contended, That reasonable diligence had been used in
 communicating the notice of the dishonour of the bill to the
 drawer. The notice could not have reached the plaintiffs at
Manchester, by the course of the post, till past eight o'clock
 in the morning of the 12th, and the post goes not out again

for

for *Liverpool* about noon; so that there was not more than an interval of four hours; and therefore, unless it * be an inflexible rule of law that notice of the dishonour must be sent by the very next post after it is received, the question was fairly left to the jury, Whether the plaintiffs had been guilty of laches in not sending intelligence by that day's post?—and they have found in the negative. It is not compatible with the usual course of business in the world, nor with common personal convenience, nor agreeable to the general rule of law in other cases, to notice such minute portions of time less than a day. It is unreasonable to require that a man shall be bound to leave all other business and concerns of life, to attend solely to one particular occurrence. It was reasonable for the jury to presume, as the notice was not forwarded on the 12th, that the plaintiffs were from home when the letter was received at their house, or that they had other more important concerns to attend to within those four hours; and the direction was right, if it were but competent to the jury to make such a presumption. Then if the plaintiffs had till the next day to send the notice, so far from not having used due diligence, they shewed more than ordinary attention to the matter in sending notice by a private hand. It is true that, by some accident, which does not appear, the letter did not reach the drawer's hands till after the usual post hour of delivery from *Manchester* to *Liverpool*: but no fault is imputable to the plaintiffs on that account; for he still received it in time to have written by the *London* post of the same night, had he possessed common firmness of nerves; and the plaintiffs ought not to suffer because of the drawer's deficiency in that respect: and, ultimately indeed, no detriment was received by the want of notice to the drawer the day before, the acceptor having no funds of the drawer in his hands. In *Tindall v. Brown*, (a) where the line was first attempted to be strictly drawn, it was considered, that even where the parties lived in the same place, notice to the indorser, given the next day after the dishonour of the note, would have been sufficient, if the holders had not on that day given him a new credit till the close of the banking-hours, at four o'clock in the afternoon: and though it was there said, That if the party to be charged

1805.

DARBISHIRE
against
PARKER.
* [6]

[7].

(a) 1 Term Rep. 167.

1805.
 DARBISHIRE
 against
 PARKER.

do not live in the same place, the holder must write by the next post after the bill is dishonoured; yet, that must necessarily mean the next practicable post under all the circumstances, due regard being had to other business and to accidents. It is, in short, a mixed question of law and fact, whether the bill were presented in *reasonable* time, and therefore properly left to the jury, as was done in *Muilman v. D'Eguino*. (a)

Lord *Ellenborough*, C. J. That was the case of a foreign bill drawn payable in the *East Indies* so many days after sight; and the Court only determined that it was not necessary to send notice of the dishonour by an accidental foreign ship which sailed from thence not direct for *England*; but that it was sufficient to have sent notice by the first regular *English* ship which sailed for *England*, considering the latter in the nature of the regular post between the two countries.

[8] In the last case on this subject, *Haynes v. Birks*, (b) Lord *Alvanley* said, that there was no law which required notice to be given within any certain fixed time; that it need not be given with all the dispatch which could possibly be used, but with all the dispatch that could reasonably be expected. And there the bill, which was put by the plaintiff in the hands of his bankers to present for payment, having been dishonoured in *London* about two o'clock on *Saturday*, and presented again at nine in the evening by a notary, and notice given of the dishonour to the plaintiff on *Monday*, at *Knightsbridge*, who gave notice of it to the indorser on *Tuesday*, at noon, in *Tottenham-Court Road*: this was deemed to be reasonable notice; and Lord *Alvanley* observing that it did not appear at what time on *Monday* the plaintiff received the notice from his bankers, said, that "he was not bound to be at home the whole of the day; and supposing him to have returned home late on that day, he was not bound to send a special messenger to the defendant: if he informed him by the course of the post, it was sufficient; and supposing him to have so done, the defendant would only receive his letter on *Tuesday*."

Gibbs and *J. Clarke*, *contra*, were stopped by the Court.

(a) 2 II. Blac. 565.

(b) 3 Bos. & Pull. 599

LORD ELLENBOROUGH, C. J. It comes to the point whether I was right in telling the jury that the plaintiffs had till the next day after they received the notice of the bill's being dishonoured to communicate that notice to the drawer; for it struck me, that if they were in time to give notice on the 13th at *Liverpool*, they had the whole of that day, and having sent a letter of advice by a private hand to the drawer in time for him to have written by the post of that night to *London*, they might be considered to have used due diligence. There appears to me considerable difficulty in laying down any certain time within which notice must at all events be given. The general direction, indeed, of *Marius* and other writers, is to send notice of the dishonour of a bill by the next post, where the parties do not live in the same place; and the same was said in *Tindall v. Brown*: and yet, in that case, it was considered sufficient if notice were given the next day, where the parties all lived in the same town. If notice must at any rate be communicated by the *next* post after it is received, it must often happen that the party will not have a day, or any thing like a day, to give it in; for the post may go out immediately or very soon after the letter of advice arrives. There must, therefore, be some *reasonable* time allowed, and that too, accommodating itself to other business and affairs of life; otherwise it is saying that a man who has bill-transactions passing through his hands must be nailed to the post-office, and can attend to no other business, however urgent, till this is dispatched. But if there be a reasonable time between the coming in and going out of the post on the same day, as in this case four or five hours may be contended to be, allowing for reasonable diligence in other concerns as well as in this, it would be a material question, if neatly raised, whether the party were bound to communicate by the next post the intelligence he had received by the post on the same day. I think, however, there is sufficient doubt in this case, whether reasonable diligence were used, to make it proper to send the case to be considered by another jury; for here the plaintiffs not only did not write by the next post of the same day, which went out after an interval of four or five hours, but they did not even write by the post of the next day, but relied on a private hand to carry the letter of advice, by which

1805.

DARRISHIRE
against
PARKER.

[9]

1805.

DARBISHIRE
against
PARKER.

[10]

which it was not in fact delivered till after the post-hour of delivery in *Liverpool*.

GROSE, J. It was said by Lord *Mansfield* and Mr. Justice *Buller* in *Tindall v. Brown*, that *reasonable notice* was a mixed question of law and fact; the situation and places of parties, the post-hours, and other matters of that sort, are facts to be ascertained by the jury; but whether under such and such circumstances notice were given in reasonable time is a question of law, on which they ought to receive direction of the Judge. When it is said in the books that notice must be sent by the *next* post to a party living at another place, that cannot be taken literally in all cases, but must mean the next convenient, the next practicable post. It cannot be meant to apply to a case where the post goes out the next minute after advice received. But here the question did not turn on that; for if the plaintiffs were not bound to have written by the post of the same day, they should at least have written by the next day's post: instead of which it appears that they sent notice by a private hand, by means of which the delivery was delayed, and the opportunity lost of writing by the *London* post the same night.

LAWRENCE, J. The question in this case is not Whether notice of the dishonour of a bill must be communicated by the next post after it is received? but Whether the party may omit to make such communication for the two next posts? for here it appears, that no notice was given to the drawer till after the time when the second post would have conveyed it. Whenever the general question shall arise, it will be fit, according to what was said by Lord *Mansfield* in *Tindall v. Brown*, to lay down, with as much certainty as possible, some general rule with respect to the reasonableness of notice. The general rule, as collected from that and other cases, seems to be with respect to persons living in the same town, that the notice shall be given by the next day; and, with regard to such as live at different places, that it shall be sent by the next post; but if in any particular place the post should go out so early after the receipt of the intelligence as that it would be inconvenient to require a strict adherence to the general rule, then, with respect to a place so circumstanced, it would not be reasonable to require the notice to be sent till the second post. Consider-
ing

[11]

ing the immense circulation of paper in this kingdom, it is very material to have some general rule by which men may know how they are to act in these cases; leaving parties in particular cases, where compliance with such rule cannot be reasonably expected, to account for their non-compliance with the strict rule. When it is said to be strange that notice given the next day to persons living in the same town should be sufficient, and yet that notice should be required to be sent by the next post on the same day to persons living at another place, it must be considered not merely when it is sent, but when it is received by the persons who are to act upon it. *Marius*, and other general writers, say that the notice ought to be transmitted by the next post after it is received; and what was said by some of the Judges in *Tindall v. Brown*, and in other cases, agrees with this. As to whether reasonable notice be a question of law or fact, it must be recollected that the facts stated in the report of *Tindall v. Brown* were afterwards found in a special verdict, in which the jury did not find whether the notice were reasonable or not; on which special verdict this Court gave judgment for the plaintiff, and that judgment was unanimously confirmed in the Exchequer-chamber. (a) But if reasonable notice were a question of fact and not of law, I am at a loss to know how those judgments are to be sustained; for the jury did not find the fact of reasonable notice, but left that as a question of law, to be inferred from all the circumstances. But if it were a question of fact, there ought to have been a *venire de novo* in that case. In *Bell v. Wardell*, (b) where a custom was pleaded for the inhabitants of a town to walk and ride over a certain close of the plaintiff at all *seasonable* times,—what was to be deemed a *seasonable time* was considered to be a question of law, arising out of all the circumstances; of which Lord C. J. *Willes* says, “the Court were the proper judges as in the case of *reasonable time*, reasonable fines,” &c. “For,” he adds, “what is contrary to reason cannot be consonant to law, which is founded on reason; and, therefore, the *reasonableness* in these and the like cases depends on the law, and is to be decided by the Judges.” And in the same case he

1805.

DARBISHIRE
against
PARKER.

[12]

(a) Vid. 2 Term Rep. 86.

(b) Willes, 204, 6.

1805.

DARBISHIRE
against
PARKER:

says, "issues may be joined on things which are partly matters of fact, and partly matters of law: and then, when the evidence is given at the trial, the Judge must direct the jury how the law is; and if they find contrary to such direction, it is a sufficient reason for a new trial." And this is consonant to the universal practice on trials for crimes, *e. g.* murder, where the question is, Whether the facts in proof amount to murder or manslaughter? the Judge directs the jury, as it is stated in *Oneby's* case: (a) "If you believe such and such witnesses, who have sworn such and such facts, the killing the deceased was with malice prepense express, or it was with malice implied, and then you ought to find the prisoner guilty of murder: but if you do not believe those witnesses, then you ought to find him guilty of manslaughter only." And the jury may give a general verdict of murder or manslaughter; "but if they will find the facts specially, the Court are to form their judgment from the facts found, whether they were malice or not, or whether the fact were done on a sudden transport of passion, or were an act of deliberation or not."

[13]

LE BLANC, J. Whether the plaintiffs ought to have sent notice of the dishonour of the bill to the drawer by the post of the 12th, the same day they received the notice, or by the post of the next day, they have failed in both respects; for they only sent it on the next day by a private conveyance; by which means it was not delivered till after it would have reached the drawer by the post. It is, therefore, unnecessary to determine the general question; but whenever that shall arise, the Court will have to consider whether reasonable notice be a question of fact or of law. In the cases of *Tindall v. Brown* and *Metcalf v. Hall*, (b) it was considered as a question of law, but dependent upon facts. If it should be considered to be the general rule of law that the holder is to send notice by the next post after he receives it; if he should not have done so, it will be for him to shew, when charged with laches, an excuse for the omission; as that he lived too far from the post office, or that the post departed again too soon, or that he was unavoidably engaged in other business, which prevented him from writing by the very

(a) 2 *Ld. Raym.* 1485.—1494.

(b) *Tr.* 22 *Geo. 3. B. R.* cited 1 *Term Rep.* 168, 408, 519.

next post; and then the jury will have to consider the validity of such excuse in point of fact for his non-compliance with the rule of law; but, it is material to have some general rule established, otherwise there may be one rule for estimating what shall be deemed reasonable notice in *London*, and another at *Bristol*, and a third at *Liverpool*. But after a general rule established, it will be material in each particular case for the party charged with laches, in not having complied with such rule, to shew matter sufficient to excuse him from the laches.

Rule absolute. (a)

(a) Whether reasonable notice be a question of law or fact, has been started in two other cases, which I have noted. One was

Hilton v. Shepherd, which first came on upon a motion for a new trial in Easter term 1796. It was an action by an indorsee against an indorser, tried before Lord Kenyon, C. J. at the sittings at Westminster; and the facts were, That one P. Pym, in London, drew the bill stated in the declaration, in the following form: "London, Sept. 19, 1795. Two months after date pay the order of Mr. Shepherd 26*l*. 6*s*. value received. P. Pym. Payable when due at Messrs. Lockharts and Co. Pall-Mall." The bill was indorsed by the defendant to the plaintiff, by the plaintiff to William Buckler, by W. Buckler to Messrs. Fox and Payne, by them to James Scott, and by J. Scott to one Trimmer of White Friars, in whose hands it was when it became due. The defendant lived in Oxford Street, and so did the plaintiff. Buckler lived in King-street, Cheapside; Messrs. Fox and Payne in Henrietta-street, Covent Garden; and J. Scott at Stratford, four miles from London. The bill became due on Saturday 21st November (the three days' grace ending on Sunday): and on the Saturday was presented for payment at Messrs. Lockharts and Co. by Trimmer, but it was not paid; and at 3 o'clock of the same day Trimmer gave notice of the non-payment thereof to Scott at Stratford; on Sunday the 22d, at one o'clock, Scott gave the like notice to Messrs. Fox and Payne, Mr. Fox being then at Stratford; on Monday the 23d, about twelve o'clock, Fox gave the like notice to Buckler; and at his desire, on Tuesday morning, the 24th, at ten o'clock, gave the like notice by letter to Hilton the plaintiff, in Oxford-street; and who, upon his return home from the city, at twelve o'clock of the same day, sent a notice by letter to the defendant of the non-payment of the bill; and the defendant neglecting to pay the same, the plaintiff brought the same action, and recovered a verdict by the advice of Lord Kenyon.

Erskine moved to set aside the verdict, upon the ground of a misdirection by Lord Kenyon at the trial in point of law; he having stated to the jury (which* his Lordship himself declared in Court) that it was a question for them to consider, Whether, under the circumstances, the plaintiff had been guilty of any laches or negligence? which they had determined in the negative. He contended, that whether the bill had been presented within reasonable time or not, or whether notice of non-payment had been given to the drawer in reasonable time, were questions of law; and that upon the authority of *Tindall v. Brown*, 1 Term Rep. 167, his Lordship ought to have told the jury that they were bound to find for the defendant; for in that case it was considered, that notice ought to be given to the drawer of non-payment by the acceptor by the next day, where the parties all lived in the same place, as here, or by the next post after the dishonouring, if they lived at a distance; whereas here the bill became due on the 21st, and no notice was given to the defendant till the 24th; which was laches in point of law.

The Court then granted a rule to shew cause, which came on to be heard on Wednesday, April 27th, 1796, when Lord Kenyon reported the facts; and concluded with saying that he had left it to the jury, whether the plaintiff had been

1805.
DARBISHIRE
against
PARKER.

[14]

Where a bill of exchange passed thro' the hands of five persons, all of whom lived in London or the neighbourhood, and the bill when due being dishonoured, the holder gave notice on the same day to the 5th indorser, and he on the next day to the 4th, and he on the next day to the 3d, and he on the next day to the 2d, and he on the same day to the 1st; the Court were of opinion, on a case finding these facts, that due diligence had been used. And Lord Kenyon thought that the question of due diligence was proper to be left to the jury; on which the other judges gave no opinion.

* [15]

guilty

1805.

DARBISHIRE
against
PARKER.

guilty of laches; who found that he had not been guilty of any, and gave a verdict for him.

Garrow and Russell shewed cause against that rule, contending that whether the notice had been given in reasonable time or not, must, from the necessity of the thing, be a question of fact for the consideration of the jury. It depended upon a thousand combinations of circumstances which could not be reduced to rule. If the party were taken ill; if he lost his senses; if he were under duress, &c. how could laches be imputed to him? Suppose he were prevented from giving notice within the time named by a physical impossibility? Such a rule of law must depend upon the distance, upon the course of the post, upon the state of the roads, upon accidents; all which it is absurd to imagine. Here the note had travelled through five different hands; and though the law should presume that the holder knows the residence of the person from whom he immediately received it, yet he cannot be presumed to know the residence of the other indorsers. Therefore, in passing through so many hands, time must be consumed, though no laches can be imputed in any one instance; and if due diligence were used in respect of each particular transaction, that cannot constitute laches upon the whole. The plaintiff was bound to pay the bill when called on, for he had no means of ascertaining whether any of the antecedent holders had been guilty of laches.

[16]

Erskine, *contra*, again insisted upon the case of *Tindall v. Brown*; that at all events it was *prima facie* a want of due diligence where all the parties lived so near to each other; and that the *onus* lay on the plaintiff, to shew that he was prevented by some inevitable accident from giving notice before.

Lord KENYON, C. J. I cannot conceive how this can be a matter of law. I can understand that the law should require that due diligence shall be used, but that it should be laid down that the notice must be given that day or the next, or at any precise time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived, that whether due diligence had or had not been used, was a question for the jury to consider, under all the circumstances of accident, necessity, and the like. This, however, is a question very fit to be re-considered; and when it goes down to trial again, I shall advise the jury to find a special verdict. I find invincible objections in my own mind to consider that the rule of law requiring due diligence is tied down to the next day. The Court, therefore, granted a new trial, for the purpose of having the question of law more solemnly considered.

And, accordingly, at the next trial, the facts were drawn up in the shape of a case, and a verdict taken for the plaintiff, subject to the opinion of this Court on those facts, whether the plaintiff were entitled to recover. This was set down for argument in Michaelmas Term, 37 Geo. 3. and Russell was to have argued for the plaintiff: but when the case was called on, no person appeared on the part of the defendant; and Russell informed the Court that he understood that the defendant had abandoned his case; whereupon the Court directed the *postea* to be delivered to the plaintiff.

Dubr. by Lord Kenyon, when the question of reasonable notice as to the dishonor of a bill of exchange by the indorsee of a bill of exchange against the drawer. It appeared, upon Lord Kenyon's report, upon a motion to set aside the verdict for the plaintiff, and to grant a new trial, that the bill when presented to the drawee was refused to the dishonor of the drawer the next day; but no such notice was given by the indorsee, the holder; but that the drawer had no assets at the time in the hands of the drawee. And that, upon a meeting some time after, but before the action brought, between the indorsee (the plaintiff) and the drawer (the defendant) after the bill fact to be submitted to the jury under all the circumstances of the case. But tho' the holder may have lost his remedy by laches, in not giving notice against the drawer, and (such notice given by the drawee to the drawer the next day, will not suffice for notice by the holder) yet a subsequent promise to the holder by the drawer that he will see the bill paid, will support an assumpsit.

Erskine and Espinasse, in shewing cause, said that the rule, as to giving notice, laid down in *Tindall v. Brown*, 1 Term Rep. 167, namely, that it was a question of law, and was to be strictly enforced in point of time, was not warranted, *and was nowhere else to be found. But that, at any rate, no notice was necessary here, because it was known to be only an accommodation bill, and

* [17]

and the drawee had no assets of the drawer's. (a) But, independent of that consideration, the subsequent promise to pay, for which there was certainly an equitable consideration, put an end to any doubt. Gibbs, *contra*, admitted that this last objection was decisive.

Lord KENYON, C. J. As to the case of *Tindall v. Brown*, I am always better satisfied when I see the sense of rule laid down; but I own I do not see the sense of the rule there referred to. Whether reasonable notice have or have not been given must depend on the circumstances of the case, of which the jury will judge; but here the subsequent promise is decisive.

Per Curiam,

Rule discharged.

(a) Vid. *Goodall v. Dolly*, 1 Term Rep. 712.

1805.

DARBISHIRE
against
PARKER.

NEWSOM and Another against THORNTON and Another.

Thursday,
Jan. 24th.

IN trover for certain barrels of beef and certain other barrels of pork, it appeared at the trial before Lord *Ellenborough*, C. J. at the sittings after last *Trinity* term at *Guildhall*, that the Plaintiffs were *Irish* merchants residing at *Cork*, and were used to consign provisions to *Matthew Church*, a merchant of *London*. The beef in question was shipped on board the *Nancy* by the plaintiffs in *December*, 1802, and consigned on their own account to *Church* as their factor for sale; and the bill of lading, signed by the captain, and dated "*Cork, 17th December, 1802*," was to deliver "to order or assigns," and was indorsed by *Newsom*, and transmitted to *Church*. The pork was shipped on board the *Russell* in *May*, 1803, and consigned * by the plaintiffs on the joint account of themselves and *Church*; and the bill of lading signed by the captain, and dated "*Cork, 20th May, 1803*," was to deliver "to *Matthew Church* or his assigns." The plaintiffs at the same time drew a bill on *Church* for half the amount of the latter shipment; but it was never paid nor even presented, in consequence of the subsequent bankruptcy of *Church*. Soon after the arrival of the bill of lading for the beef in *December*, *Church* being in embarrassed circumstances, obtained from the Defendants a loan of 200*l.* which they agreed to advance him on having the bill of lading of the beef deposited with them; and accordingly, the bill of lading was indorsed by *Church* to the defendants, and

A factor cannot pledge the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves; tho' the indorsee knew not that he was factor: and where goods were consigned on the joint account of the consignors & consignee, & a bill of lading was sent to deliver the goods to the consignee to his assigns; who afterwards indorsed & delivered it to the defendants upon condition of their making an advance to him on it, which they failed to do, but claimed to regain it as a security for prior advances; held that such indorsement and delivery of the bill of lading did not divest the consignors' right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them.

* [18]

and

1805.

NEWSOM
against
THORNTON.

[19]

and deposited with them as a security for that advance : but it did not appear that the defendants knew that the beef had been consigned to him only as factor. *Church* still continuing to be embarrassed, previous to his departure for *Ireland*, about the 12th of *May*, 1803, having before sent an order for the pork, agreed with the defendants in consideration of a further advance, to leave with them an order upon one *Cole*, who was his clerk, to indorse and deliver to them the bill of lading for the pork when it arrived ; and, in consequence, upon his departure, he left word with *Cole*, that in case money was wanted during his absence, he should apply to the defendants for it ; and was to indorse and deliver to them the bill of lading when it arrived. After *Church's* departure, *Cole*, who had received the bill of lading, applied to the defendants for an advance of 500*l.* and upwards for *Church*, which they refused ; but, nevertheless, contrived to obtain from him the bill of lading with his indorsement, he not being fully apprized of the agreement between them and his master, and understanding from them that immediately previous to *Church's* departure for *Ireland*, they had made another advance to him upon the promise of this assignment. *Church* stopped payment the latter end of *June*, and was soon after declared a bankrupt, not having paid for either beef or pork. In the mean time, before he was declared a bankrupt the pork having arrived, and the plaintiffs having been apprized of the insolvency of *Church*, they gave notice to the captain of the *Russell* to stop the delivery of it to *Church* or to the defendants, and tendered him the freight and charges : the captain, however, delivered the pork to the defendants upon the production of the bill of lading, and taking their indemnity. And by means of the other bill of lading they had previously obtained the possession of the beef, of which, as well as of the pork, the freight and other charges were tendered to the defendants, which they refused to accept or to return the goods. It was also proved, that the usual credit for provisions of this description sent from *Ireland*, is three months : and, therefore, that a bill of lading, within that date, conveys to persons conversant in the trade, as the defendants were, intimation that the goods were probably not paid for by the consignee. Lord *Ellenborough*, in his direction to the jury,

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distinguished between the beef and the pork: that the first having been consigned to *Church* as a *factor*, gave him no authority to *pledge* the goods, but only to *sell* them for his principal; and that by the same rule he had no authority to pledge *the bill of lading*, which was the mere emblem of the goods themselves. That as to the pork which was consigned to *Church* on the *joint* account of himself and the plaintiffs, though he had a right to pledge it as a *joint owner*, yet having agreed to pledge it to the defendants only on condition of a further advance from them, and they having obtained possession of the bill of lading from his clerk, with his indorsement, in the absence of *Church*, without complying with that condition, they had no right to retain the goods against the plaintiffs, who had applied in time to stop the delivery of them while *in transitu*; and were, therefore, entitled to recover the value of the pork as well as of the beef. And the jury accordingly found a verdict for the plaintiffs for the whole value of both parcels.

1805.
NEWCOM
against
THORNTON.

[20]

It was moved in the last term to set aside the verdict, on the ground that the indorsement and delivery of a bill of lading of goods *in transitu* transferred the legal property in them to the indorsee, the bill of lading being a negotiable instrument by the custom of merchants, according to the authority of *Lickbarrow v. Mason (a)* (which was afterwards confirmed

(a) 2 Term Rep. 63. That case first came on upon a demurrer to evidence, on which there was judgment for the plaintiff: this Court holding, that though the vendor of goods might, as between himself and the vendee, stop them *in transitu* to the latter, in case of his insolvency, not having paid for them; yet that if the vendee, having in his possession the bill of lading indorsed in blank by the vendor, before such stopping *in transitu*, indorse and deliver it to a third person for a valuable consideration and without notice of the non-payment, the right of the vendor to stop *in transitu* is thereby divested as against such *bona fide* holder of the bill. This judgment was reversed upon a writ of error in the Exchequer Chamber; where it was considered that a bill of lading was not a negotiable instrument, the indorsement of which passed the property *proprio vigore*, like the indorsement of a bill of exchange; though to some purposes it was assignable by indorsement, so as to operate as a discharge to the captain who made a delivery *bona fide* to the assignee. 1 H. Blac. 357. The latter judgment was in its turn reversed in the House of Lords in Tr. 33 Geo. 3. and a *venire facias de novo* directed to be awarded by B. R. 5 Term Rep. 367, and 2 H. Black. 211. The ground of that reversal was, that the demurrer to evidence appeared to be informal on the record MS. The very elaborate opinion delivered by Mr. Justice Buller upon the principal question before the house, a copy of which he afterwards permitted me to take, I shall here subjoin, as it contains the most comprehensive view of the whole of this subject which is anywhere to be found. A *venire facias de novo* having been accordingly awarded by B. R. a special verdict was found upon the second trial, containing in substance the same facts

1805. confirmed in *Hunter v. Baring*) where Lord *Kenyon* left it to the jury to find what was the effect of such an instrument by the custom of merchants; and it was found by the jury

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 NEWSOM
 against
 THORNTON.

facts as before, with this addition, that the jury found, that by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the shipment, and before the voyage performed, negotiable and transferrable by the shipper's indorsement and delivery, or transmitting of the same to any other person: and that by such indorsement and delivery or transmission, the property in such goods is transferred to such other person. And that by the custom of merchants, indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the goods to be made to such person: and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper. On this special verdict, the Court of B. R., understanding that the case was to be carried up to the House of Lords, declined entering into a discussion of it, merely saying, that they still retained the opinion delivered upon the former case: and gave judgment for the plaintiffs. 5 Term Rep. 683.

(LICKBARROW and Another against MASON and Others, in Error.)
 Dom. Proc. 1793.

BULLER, J. Before I consider what is the law arising on this case, I shall endeavour to ascertain what the case itself is. It appears that the two bills of lading were indorsed in blank by Turing, and sent so indorsed in the same state by Freeman to the plaintiffs, in order that the goods might, on their arrival at Liverpool, be taken possession of, and sold by the plaintiffs on Freeman's account. I shall first consider what is the effect of a blank indorsement; and secondly, I will examine whether the words, "to be sold by the plaintiffs on Freeman's account," make any difference in the case. As to the first, I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. In the case of bills of exchange, the effect of a blank indorsement is too universally known to be doubted: and, therefore, on that head I shall only mention the case of *Russell v. Langstaffe*, Douglas, 496, where a man indorsed his name on copper-plate checks, made in the form of promissory notes, but in blank, i. e. without any sum, date, or time of payment: and the Court held, that the indorsement on a blank note is a letter of credit for an indefinite sum; and the defendant was liable for the sum afterwards inserted in the note, whatever it might be. In the case of bills of lading, it has been admitted at your Lordships' bar, and was so in the Court of King's Bench, that a blank indorsement has the same effect as an indorsement filled up to deliver to a particular person by name. In the case of *Snee v. Prescott*, Lord Hardwick thought that there was a distinction between a bill of lading indorsed in blank, and one that was filled up; and upon that ground part of his decree was founded. But that I conceive to be a clear mistake. And it appears from the case of *Savignac v. Cuff*, (of which case I know nothing but from what has been quoted by the counsel, and that case having occurred before the unfortunate year 1780 (a) no further account can be obtained) that though Lord Mansfield at first thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. In *Solomons v. Nissen*, Mich. 1788, (2 Term Rep. 674.) the bill of lading was to order or assigns, and the indorsement in blank; but the Court held it to be clear that the property passed. He who delivers a bill of lading indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases; and

(a) Lord Mansfield's papers were then burnt, together with his house, in the riots of that period.

jury to be the custom to pass the property by the indorsement and delivery of it; and that though it were admitted that a factor had no general authority to pledge the goods of

1805.
 —
 NEWSOM
 against
 his THORNTON.

it has the same effect as if it were filled up with an order to deliver to him. The next point to be considered is, What difference do the words "to be sold by the plaintiffs on Freeman's account," make in the present case? It has been argued that they prove the plaintiffs to be factors only. But it is to be observed that these words are not found in the bill of lading itself: and, therefore, they cannot alter the nature and construction of it. I say they were not in the bill of lading itself; for it is expressly stated that the bill of lading was sent by Freeman in the same state in which it was received, and in that there is no restriction or qualification whatever; but it appeared by some other evidence, I suppose by some letter of advice, that the goods were so sent, to be sold by the plaintiffs on Freeman's account. Supposing that the plaintiffs are to be considered as factors, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiffs being liable to render an account to Freeman for those goods afterwards, will not put Turing in a better condition in this cause; for a factor has not only a right to keep goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account. The truth of the case, as I consider it, is, that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them, and pay themselves the 520*l.* advanced in bills out of the produce, and so be accountable to Freeman for the remainder, if there were any. But if the goods had not sold for so much as 520*l.* Freeman would still have remained debtor to the plaintiffs for the difference; and so far only they were sold on Freeman's account. But, I hold, that a factor who has the legal property in goods can never have that property taken from him, till he is paid the uttermost farthing which is due to him. *Kruger v. Wilcocks*, Anbl. 252. This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any questions which ever can arise. The first is, Whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, Whether the defendant, who stands in the place of the original owner, had a right to stop the goods *in transitu*? And as to the first, every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee. In 1690 it was so decided in the case of *Wiseman v. Vandeputt*, 2 Vern. 203. In 1697, the Court determined again in *Evans v. Marlett*, that the property passes by the bill of lading. That case is reported in 1 *Ld. Ray.* 271, and in 12 *Mod.* 156; and both books agree in the points decided. Lord Raymond states it to be, that if goods by a bill of lading are consigned to *A.*, *A.* is the owner, and must bring the action: but if the bill be special, to be delivered to *A.* to the use of *B.*, *B.* ought to bring the action; but if the bill be general to *A.*, and the invoice only shews that they are on account of *B.* (which I take to be the present case) *A.* ought always to bring the action; for the property is in him, and *B.* has only a trust. And Holt, C. J. says the consignee of a bill of lading has such a property as that he may assign it over; and Shower said it had been so adjudged in the Exchequer. In 12 *Mod.* it is said that the Court held that the invoice signified nothing; but that the consignment in a bill of lading gives the property, except where it is for the account of another; that is, where on the face of the bill it imports to be for another. In *Wright v. Campbell*, in 1767, (4 *Burr.* 2046) Lord Mansfield said, "If the goods are *bona fide* sold by the factor at sea (as they may be where no other delivery can be given) it will be good notwithstanding the stat. 21 Jac. 1. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered: and the owner can never dispute with the vendee, because the goods were sold *bona fide*, and by the owner's own authority." His Lordship added (though that is not stated in the printed report) that the doctrine in *Lord Raymond* was right, that the property of goods at sea was transferrable. In *Featou v. Bowers*,

1805. his principal, yet if the principal indorsed the bill of lading to his factor generally, he thereby enabled him to hold himself out to the world as the ostensible owner of the goods, and

NEWSOM
against
THORNTON.

Bowers, in 1753, Lord C. J. Lee held, That a bill of lading transferred the property, and a right to assign that property by indorsement; but that the captain was discharged by a delivery under either bill. In *Snee v. Prescott*, in 1743 (1 Atk. 245) Lord Hardwicke says, "Where a factor, by the order of his principal, buys goods with his own money, and makes the bill of lading absolutely in the principal's name, to have the goods delivered to the principal, in such case the factor cannot countermand the bill of lading; but it passes the property of the goods fully and irrevocably in the principal." Then he distinguishes the case of blank indorsement, in which he was clearly wrong. He admits too, that if upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In *Caldwell v. Ball*, in 1780 (1 Term Rep. 205) the Court held that the indorsement of the bill of lading was an immediate transfer of the legal interest in the cargo. In *Hibbert v. Carter*, in 1787 (1 Term Rep. 745) the Court held again that the indorsement and delivery of the bill of lading to a creditor *prima facie*, conveyed the whole property in the goods from the time of its delivery. The case of *Godfrey v. Furzo*, 3 P. Wms. 185. was quoted on behalf of the defendant. A merchant at Bilbao sent goods from thence to *B.*, a merchant in London, for the use of *B.*, and drew bills on *B.* for the money. The goods arrived in London, which *B.* received, but did not pay the money, and died insolvent. The merchant beyond sea brought his bill against the executors of the merchants in London, praying that the goods might be accounted for to him, and insisting that he had a lien on them till paid.

Lord Chancellor says, when a merchant beyond sea consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and consequently they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy. The whole of this case is clear law; but it makes for the plaintiffs and not for the defendants. The first point is this very case: for the bill of lading here is generally to the plaintiffs, and therefore on their account; and in such case, though the money be not paid, the property vests in the consignee. And this is so laid down without regard to the question, whether the goods were received by the consignee or not. The next point there stated is, What is the law in the case of a pure factor, without any demand of his own? Lord King says he would have no property. This expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance, or under acceptances on account of the goods, is simply and merely a servant or agent; for which no authority has been, or, as I believe, can be produced. Here the bills were drawn by Freeman upon the plaintiffs upon the same day, and at the same time, as he sent the goods to them; and therefore this must, by fair and necessary intendment, be taken to be one entire transaction; and that the bills were drawn on account of the goods, unless the contrary appear.—So far from the contrary appearing here, when it was thought proper to allege on this demurrer that the price of the goods was not paid, it is expressly so stated; for the demurrer says, that the price of the goods is now due to Turing and Son. But it finds that the other bills were afterwards paid by the plaintiffs; and consequently they have paid for the goods in question. As between the principal and mere factor, who has neither advanced

and thereby to impose on persons like the defendants who were not cognizant of his real character as factor, but dealt with him on the supposition that the goods were consigned

1805.

NEWSOM
against
THORNTON.

advanced nor engaged in any thing for his principal, the principal has a right at all times to take back his goods at will : whether they be actually in the factor's possession, or only on their passage, makes no difference ; the principal may countermand his order : and though the property remain in the factor till such countermand, yet from that moment the property reverts in the principal, and he may maintain trover. But in the present case the plaintiffs are not that mere agent or servant ; they have advanced 520*l.* on the credit of those goods, which at a rising market were worth only 557*l.* ; and they have beside, as I conceive, the legal property in the goods under the bill of lading. But it was contended at the Bar, that the property never passed out of Turing ; and to prove it, 11*ob.* 41 was cited. In answer to this I must beg leave to say, that the position in Hobart does not apply ; because there no day of payment was given ; it was a bargain for ready money ; but here a month was given for payment. And in Noy's Maxims, 87, this is laid down : " If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to him to pay for them." Thorpe v. Thorpe, Rep. temp. Holt, 96, and Brice v. James, Rep. temp. Ld. Mansfield, S. P. So Dy. 30 and 7*o*. And in Shep. Touch. 222, it is laid down, That if one sell me a horse, or any thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, it is a good bargain and sale to alter the property thereof : and I may have an action for the thing, and the seller for his money. Thus stand the authorities on the point of legal property ; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster-Hall, that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment nor even a dictum, if properly understood, which impeaches this long string of cases. On the contrary, if any argument can be drawn by analogy from older cases on the vesting of property, they all tend to the same conclusion. If these cases be law, and if the legal property be vested in the plaintiffs, that, as it seems to me, puts a total end to the present case ; for then it will be incumbent on the defendants to shew that they have superior equity which bears down the letter of the law ; and which entitles them to retain the goods against the legal right of the plaintiffs, or they have no case at all. I find myself justified in saying that the legal title, if in the plaintiffs, must decide this cause by the very words of the judgment now appealed against ; for the noble Lord who pronounced that judgment, emphatically observed in it, " that the plaintiffs claim " under Freeman ; but though they derive a title under him, they do not represent him, so " as to be answerable for his engagements ; nor are they affected by any notice of those " circumstances which would bar the claims of him or his assignees." This doctrine, to which I fully subscribe, seems to me to be a clear answer to any supposed lien which Turing may have on the goods in question for the original price of them. But the second question made in the case is, that, however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods *in transitu*, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods *in transitu*, and on the nature and principle of liens. 1*st*, Neither of them are founded on property ; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights, which in given cases may be exercised over the property of another ; and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu* or not : he has a right to sell or dispose of them as he pleases, without the option of any other person : but he who has a

lien

1805.

NEWSOM
against
THORNTON.

consigned to him on his own account, which it appeared was the fact in respect to the pork ; and which latter therefore it must be admitted that he had authority to pledge.

Gibbs,

lien only on goods, has no right so to do ; he can only retain them till the original price be paid : and therefore if goods are sold for 500*l.* and by a change of the market before they are delivered, they become next day worth 1000*l.* the vendor can only retain them till the 500*l.* be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the 500*l.*—2dly, Liens at law exist only in cases where the party entitled to them has the possession of the goods ; and if he once part with the possession after the lien attaches, the lien is gone. 3dly, The right of stopping *in transitu* is founded wholly on equitable principles, which have been adopted in courts of law ; and as far as they have been adopted, I agree they will bind at law as well as in equity. So late as the year 1690, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self-evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a taylor, or an inn-keeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular goods : but, by the general usage in trade, he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In *Snee v. Prescott*, Lord Hardwicke says, that which not only applies to the case of liens, but to the right of stopping goods *in transitu* under circumstances similar to the case in judgment ; for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price ; for then no dealer would know when he purchased goods safely. So in *Lempriere v. Pasley*, (2 Term R. 485) the Court said it would be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing *in transitu* to the extent contended for by the defendants : but before I go to them, with your Lordships' permission, I will state shortly the facts of the case of *Snee v. Prescott*, with a few more observations upon it. The doctrine of stopping *in transitu* owes its origin to Courts of Equity ; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not as the counsel for the defendants would make it, Whether the property vested under the bill of lading ? for that was considered as being clear ; but Whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment ? or, in other words, divest the property which was vested in the consignee ? *Snee and Baxter*, assignees of John Tollet, *v. Prescott and others*. 1 Atk. 245. Tollet, a merchant in London, shipped to Ragueneau and Co. his factors at Leghorn, serges to sell, and to buy double the value in silks ; for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board Dawson's ship, marked T ; Dawson signed three bills of lading, to deliver at London to factors, consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not paid, and Tollet became a bankrupt. The factors sent another bill of lading, properly indorsed, to Prescott, who offered to pay the pawnee, but he refused to deliver up the bill of lading ; on which Prescott got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them : and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission.

Decreed,

Gibbs, Park, and Marryat shewed cause against the rule; 1st, with respect to the pork, admitting that Church might, as joint owner with the plaintiffs, and not merely as their

1805.
 ———
 NEWSOM
 against
 THORNTON.

Decreed, 1st, That the factors should be paid; 2d, The pawnees; and 3, The surplus to the assignees. The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods, should both be paid out of the goods before the consignee or his assignees should derive any benefit from them. That was the whole of the decree: and if the circumstance of the consignor's interest being first provided for, be thought to have any weight, I answer, 1st, That such provision was founded on what is now admitted to be an apparent mistake of the law, in supposing that there was a difference between a full and a blank indorsement. Lord Hardwicke considered the legal property in that case to remain in the consignor, and therefore gave him the preference. 2dly. That whatever might be the law, the mere fact of the consignor's being in possession, was a sufficient reason for a court of equity to say, We will not take the possession from you till you have been paid what is due to you for the goods. Lord Hardwicke expressly said, this Court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half price which they have laid down upon them. He who seeks equity must do equity; and if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will shew that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances. The case of *Snce v. Prescott* is miserably reported in the printed book: and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way: and perhaps, even he himself, by being very diffuse, has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS. note taken, as I collect, by Mr. John Cox, who was counsel in the cause; and it seems to me that, on taking the whole of the case together, it is apparent that whatever might have been said on the law of the case in a most elaborate opinion, Lord Hardwicke decided on the equity alone arising out of all the particular circumstances of it, without meaning to settle the principles of law on which the present case depends. In one part of his judgment he says, that in strictness of law, the property vested in Tollet, at the time of the purchase: but however that may be, says he, this Court will not compel the factors to deliver the goods without being disbursed what they have laid out. He begins by saying, the demand is as harsh as can possibly come into a court of equity. And in another part of his judgment he says, Suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, yet this Court would not suffer them to take out execution for the whole value, but would oblige them to account. But further, as to the right of seizing or stopping the goods *in transitu*, I hold that no man who has not equity on his side can have that right. I will say with confidence, that no case or authority till the present judgment, can be produced to shew that he has. But on the other hand, in a very able judgment delivered by my brother Ashhurst in the case of *Lempriere v. Pasley*, in 1788 (2 Term Rep. 485) he laid it down as a clear principle, That, as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason, for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him, has equity in his favour: and if he have law and equity both with him, he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion delivered in this house by the learned and respectable Judge (a) who has often had the honour of delivering the sentiments of the Judges to your Lordships when you are pleased to require it, so lately as the 14th May 1790, in the case of *Kinloch v. Craig* (3 Term Rep. 787) it was laid down that

(a) Eyre, then Lord C. B.

1805. their *factor*, have the same authority to *pledge* as well as
 sell the bill of lading, as he would have over the goods
 themselves when they arrived; yet he did neither the one
 nor

NEWSOM
 against
 THORNTON.

the right of stopping goods *in transitu* never occurred but as between vendor and vendee; for that he relied on the case of *Wright v. Campbell*, 4 Burr. 2050. Nothing remains in order to make that case a direct and conclusive authority for the present, but to shew that it is not the case of vendor and vendee. The terms Vendor and Vendee necessarily mean the two parties to a particular contract: those who deal together, and between whom there is a privity in the disposition of the thing about which we are talking. If A. sell a horse to B. and afterwards sell him to C. and C. to D. and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A. and D. together as vendor and vendee; for A. never sold to D. nor did D. ever buy of A. These terms are correlatives, and never have been applied, nor ever can be applied, in any other sense than to the persons who bought and sold to each other. The defendants, or Turing, in whose behalf, and under whose name and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs (if I may be permitted to repeat again the forcible words of the noble Judge who pronounced the judgment in question) represent Freeman so as to be answerable for his engagements, or stand affected by any notice of those circumstances which would bar the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal clearness, without recurring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence, in my humble judgment, put an end to all questions about the right of seizing *in transitu*. Two other cases were mentioned at the bar, which deserve some attention. One is the case of the assignees of *Burghall v. Howard* (a) before Lord Mansfield at Guildhall, in 1759; where the only point decided by Lord Mansfield was, That if a consignee become a bankrupt, and no part of the price of the goods be paid, the consignor may seize the goods before they come to the hands of the consignee or his assignees. This was most clearly right; but it does not apply to the present case: for when he made use of the word assignees, he undoubtedly meant assignees under a commission of bankrupt, like those who were then before him, and not persons to whom the consignee sold the goods; for in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing: and therefore the original owner could not seize them again. But the note of that case says, Lord Mansfield added, "and this was ruled, not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods *in transitu* is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does affect property, are all true; and that is all that the words mean; not that the property did not pass by the bill of lading. The commercial law of this country was never better understood, or more correctly administered than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size: and when we find him in other instances adopting the language and opinion of Lord C. J. Holt, and saying, that since the cases before him it had always been held, That the delivery of a bill of lading transferred the property at law, and in the year 1767 deciding that very point, it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform. Even the case of *Savignac v. Cuff*, of which we have no account, besides the loose and inaccurate note produced at the bar (b), as I understand it, goes upon the same principle. The note states that the counsel for the plaintiff relied on the property passing by the bill of lading; to which Lord Mansfield answered, The plaintiff has lost his lien,

(a) 1 H. Blac. 365. n.

(b) Cited in 3 Term Rep. 66.

nor the other; for the agreement was, that that bill of lading should be deposited with the defendants upon condition of a *future advance*; and in fact no future advance

1805.

NEWSOM
against

WAS THORNTON.

he standing in the place of the consignee. Lord Mansfield did not answer mercantile questions so: which, as stated, was no answer to the question made. But I think enough appears on that case to shew the grounds of the decision, to make it consistent with the case of Wright and Campbell, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice, that Lingham had not paid for the goods; and if so, then according to the case of Wright v. Campbell, he could only stand in Lingham's place. But the necessity of recurring to the question of notice, strongly proves that if there had been no such notice, the plaintiff, who was the assignee of Lingham the consignee, would not have stood in Lingham's place, and the consignor could not have seized the goods *in transitu*: but that, having seized them, the plaintiff would have been entitled to recover the full value of them from him. This way of considering it makes that case a direct authority in point for the plaintiffs. There is another circumstance in that case material for consideration; because it shews how far only the right of seizing *in transitu* extends, as between the consignor and consignee. The plaintiff in that action was considered as the consignee; the defendant, the consignor, had not received the full value for his goods; but the consignee had paid 150*l.* on account of them. Upon the insolvency of the consignee, the consignor seized the goods *in transitu*; but that was holden not to be justifiable, and therefore there was a verdict against him. That was an action of trover, which could not have been sustained but on the ground that the property was vested in the consignee, and could not be seized *in transitu* as against him. If the legal property had remained in the consignor, what objection could be stated in a court of law to the consignor's taking his own goods? But it was holden, That he could not seize the goods; which could only be on the ground contended for by Mr. Wallace, the counsel for the plaintiff, that the property was in the consignee: but though the property were in the consignee, yet, as I stated to your Lordships in the outset, if the consignor had paid to the consignee all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee; and upon paying or tendering that money, and demanding the goods, the property would have revested in him, and he might have maintained trover for them: but admitting that the consignee had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover: and in ascertaining them, regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods, he would have had no other equitable claim on them than for 150*l.* He was entitled to no more, the defendant was liable to pay no more; and therefore the verdict was given for that sum. This case proceeded precisely upon the same principles as the case of Wiseman v. Vandeput; where, though it was determined that the legal property in the goods, before they arrived, was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him: but for what was due, the Court directed an account; and if any thing were due from the Italians to the Bonnells, that should be paid the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case; for they have the legal property in the goods; and, therefore, if any thing be due to them, even in equity, that must be paid before any person can take the goods from them; and 520*l.* was due to them, and has not been paid. After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped *in transitu*, after they have been sold and paid for, or money advanced upon them *bona fide*, and without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be thought so, I beg leave to say, That in all mercantile transactions, one great point to be kept uniformly in

view

1805. was made by them on it. The interest, therefore, in the goods remained as it did before; that is, in *Church*, the consignee of a moiety as *factor* for the plaintiffs, and the vendee

NEWSOM
against
THORNTON.

view is, to make the circulation and negotiation of property as quick, as easy, and as certain as possible. If this judgment stand, no man will be safe either in buying or in lending money upon goods at sea. That species of property will be locked up; and many a man, who could support himself with honour and credit, if he could dispose of such property to supply a present occasion, would receive a check, which industry, caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be bought? There is nothing but the chance of the market; and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it: but Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, nor a right to seize *in transitu*. The great advantage which this country possesses over most, if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports: but amidst all these indulgences, the wise merchant is not unmindful of his true interests and the security of his capital. I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of London:—A cargo of goods of the value of 2000*l.* is consigned to a merchant in London; and the moment they are shipped, the merchant abroad draws upon his correspondent here to the value of that cargo; and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in London must resolve what part he will take. If he accept the bills, he becomes absolutely and unconditionally liable; if he refuse them, he disgraces his correspondent, and loses his custom directly. Yet to engage for 2000*l.* without any security from the drawer, is a bold measure. The goods may be lost at sea; and then the merchant here is left to recover his money against the drawer as and when he may. The question then with the merchant is, How can I secure myself at all events? The answer is, I will insure; and then if the goods come safe, I shall be repaid out of them; or if they be lost, I shall be repaid by the underwriters on the policy: but this cannot be done unless the property vest in him by the bill of lading; for otherwise his policy will be void for want of interest; and an insurance, in the name of the foreign merchant, would not answer the purpose. This is the case of the merchant who is wealthy, and has the 2000*l.* in his banker's hands, which he can part with, and not find any inconvenience in so doing: but there is another case to be considered, viz. Suppose the merchant here has not got the 2000*l.* and cannot raise it before he has sold the goods?—the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, How can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done in *Snee* and *Prescott*; and upon that idea, he has hitherto had no difficulty in doing so: but if he have not the property, nobody will buy of him; and then his trade is undone. But there is still a third case to be considered; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case, by way of example, That barilla is shipped for a merchant here, at a time when there has been a dearth of that commodity, and it produces a profit of 25*l. per cent.* whereas, upon an average, it does not produce above 12*l.* The merchant has advices that there is a great quantity of that article in Spain, intended for the British market; and when that arrives, the market will be glutted, and the commodity much reduced in value. He wishes, therefore, to sell it immediately whilst it is at sea, and before it arrives; and the profit which he gets by that is fair and honourable: but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation is the

vendee of the other moiety, subject to the plaintiff's right of stopping *in transitu*, which could not be less, because *Church* had only a moiety, than if he had had the whole; and then the plaintiffs having exercised that right, in consequence of the insolvency of *Church*, as far as they could in fact by demanding (a) the goods of the Captain of the *Russell*, before their delivery to *Church*, or any other person authorized by him to receive them, the defendants, who obtained possession of them afterwards by the wrongful act of the captain, held them for the persons who were legally entitled to them. The plaintiffs, therefore, are entitled to recover not only a moiety, but the whole value of the pork; because, by the stoppage *in transitu*, *Church*'s interest in the moiety as *vendee* never attached. 2dly, As to the beef, which *Church* received merely *as factor*, it being clear that *as such* he had no authority to *pledge* (b); but could only *sell* the goods, however he might have appeared to the world as the visible owner, it follows *à fortiori* that the bill of lading, which is the mere symbol of possession,

1805.
 NEWSOM
 against
 THORNTON.
 [31]
 [32]
 [33]
 [34]
 [35]
 [36]

(a) Vid. *Bohtlingk v. Inglis*, 3 East, 381.

(b) *Paterson v. Tash*, 2 Stra. 1173, and *Daubigny v. Duval*, 5 Term Rep. 604.

could

life and soul of trade; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at Guildhall, I am confident that, if the goods in question be retained from the plaintiff without repaying him what he has advanced on the credit of them, it will be mischievous to the trade and commerce of this country: and it seems to me that not only commercial interest, but plain justice and public policy forbid it. To sum up the whole in very few words: The legal property was in the plaintiff; the right of seizing *in transitu* is founded on equity. No case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord Hardwicke's opinion was clearly against it: and the law, where it adopts the reasoning and principle of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your Lordships, as my humble opinion, That the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

Ashhurst and *Grose*, Justices, also delivered their opinions for reversing the judgment of the Exchequer Chamber.

Eyre, C. J. Gould, J. Heath, J. Hotham, B. Perryn, B. and Thomson, B. *contra*.

This case stood over from time to time in the House; and was postponed, in order to consider a question which arose in another case of *Gibson v. Minet*, upon the nature and effect of a demurrer to evidence, which was thought to apply also to the present case; and, finally, The House reversed the judgment of the Exchequer Chamber, which had been given for the defendant; and ordered the King's Bench to award a *venire de novo* (upon the ground that the demurrer to evidence appeared to be informal upon the record) and that the record be remitted.

1805.

NEWSOM
against
THORNTON.

[37]

could not give him a greater authority than the actual possession of the goods themselves: for it is no more than an authority from the owner to the captain to deliver the goods to the person named therein; and such as every factor must necessarily have done before he can acquire possession of them: and so far is the bill of lading from tending to mislead the purchaser or pawnee into a belief that the factor, with whom he is dealing, is the absolute owner of the goods mentioned in it, that it gives him a better opportunity of knowing the truth, by asking for the letter of advice which conveyed, or the invoice which accompanied it, than the mere view of the goods themselves would suggest to him. The case of *Lickbarrow v. Mason* (a) does not apply to a factor; for there the question arose upon the right of stopping *in transitu*, which can only exist as between *vendor* and *vendee*.—Where there is no stoppage *in transitu*, or where that right is restrained, as was holden in that case by the previous indorsement of the bill of lading to a third person, for a valuable consideration, and without notice, the right of property remains in the vendee; but here *Church* never had any property as factor in the beef, as against the plaintiffs; he had only an authority to sell, and not to pledge. Considering, therefore, the bill of lading the same as the goods, by *pledging* it, he clearly acted beyond the scope of his authority, and cannot bind his principals. The case of *Salomons v. Nissen* (b) was also between vendor and vendee; and it appearing that the indorsee of the bill of lading had reason to think that the goods had not been paid, the right of the vendor to stop them *in transitu* was affirmed. On the same ground, there was evidence here to shew, from the known course of trade between *England* and *Ireland* in salt provisions, that the defendants must have known when they received both the bills of lading, that the goods had not been paid for. The case of *Wright and another, Assignees of Scott v. Campbell*, (c) which was the case of an indorsement and delivery of a bill of lading by a factor to one, as a security for his becoming bail for him, seems to come nearest to the present; but there the parties evidently me-

[38]

(a) Vide ante, 20.

(c) 4 Burr. 2046.

(b) 2 Term Rep. 674.

dictated a sale of the goods: and ultimately the verdict which had been found in favour of the assignees of *Scott*, to whom the bill of lading had been so indorsed, was set aside, upon the ground of there being evidence of collusion between him and the factor to cheat the principal: and so that case was explained by *Buller, J.* in *Salomons v. Nissen*.

1805.

—
NEWSON
against
THORNTON.

Erskine and *Garrow, contra*. Admitting that the bill of lading of the beef was deposited with the defendants as a *pledge* for their advance, and not by way of *sale* of the goods; yet the possession of the bill, without any special indorsement, designating that *Church* held it in his character of factor for another person, gave him the absolute controul over the property, so as to pass it by indorsement and delivery to a third person for a valuable consideration without notice. The grounds on which *Lickbarrow v. Mason* (a) was decided, apply as well to the possession of a factor as of any other person; and the decision in *Salomons v. Nissen* went wholly beside that question, upon the grounds as well of a failure of consideration in the first instance, as of notice of the defect of title in the vendee, on account of non-payment of the goods; and the indorsee was even considered as a partner with the vendee, standing in the same condition. It is true, that *Lickbarrow v. Mason* was a case between vendor and vendee; but this Court decided it on the broad ground that the indorsement of a bill of lading for a valuable consideration and without notice, conveys *per se*, the legal property in the goods to the indorsee; nor can the judgment be maintained on any other footing; for considering it as the assignment of a bare authority to the captain to deliver the goods to the holder, there could be no pretence for saying that the second purchaser ought to stand in a better situation than the first, as against the vendor. After the *venire de novo* was awarded in that case, and the cause went down to trial a second time, the jury found especially the custom of merchants to pass the property of the goods named in a bill of lading by indorsement. The cause which stood immediately preceding that in the paper for trial at *Guildhall*, was *Hunter v. Baring*, which turned upon the indorsement of a bill of lading by a *factor* to a

[39]

(a) Ante, 20.

1805.

NEWSOM
against
THORNTON.

third person, for a valuable consideration without notice; and that was holden by Lord *Kenyon* to conclude the principal's right to stop *in transitu*. [*Le Blanc*, J. I do not understand that *Hunter v. Baring* was the case of a *factor* who had *pledged* the bill of lading.—*Erskine* answered, That he would not undertake to say that it was.] The case of *Wright v. Campbell* (a) however was the case of a bill of lading *pledged* by a *factor* as a security to another, who had become bail for him: and the very ground of *collusion*, on which the new trial was ultimately granted, and the language used by Lord *Mansfield* shew, that if the transaction had been considered as a fair one, the transfer of property, by the indorsement to the extent of the pledge, would have been sustained. No sale could have been there intended; for the value of the goods was much beyond the sum for which the bill of lading was pledged as a security: but if such a pledge by a factor were at all events void, it was nugatory to consider the question of collusion (b). [Lord *Ellenborough*, C. J. The indorsement in that case was absolute as for a *sale*, and not as a *pledge*; that is, the security meant to be given by the indorsement of the bill of lading was *through the medium of a sale*, and not of a *pledge*. Now here there is no ground for saying, That the parties meditated an immediate *sale* of the goods by depositing the bill of lading: it was deposited as a *pledge* for the repayment of the loan.] The case of *Wright v. Campbell* was not put on that ground; nor was it so considered by any of the Court in commenting on it in *Lickbarrow v. Mason*; but the true principle is, That if one man put it in the power of another to cheat a third person, he must abide the consequences; and it is the less necessary to make an exception to the general rule in the case of a factor, because the principal may always prevent the mischief by making a special indorsement to his correspondent by the name of his *factor*; which will give notice of the transaction to every person into whose hands the bill of lading comes.

LORD ELLENBOROUGH, C. J. There are two subjects of consideration: the bill of lading for the pork, and that for

(a) 4 Burr. 2046.

(b) It was necessary, in either view of the case, to grant a new trial, as the first verdict was in support of the validity of the indorsement of the bill of lading.

the beef. First, as to the pork. As there was no consideration paid for that bill of lading by the defendants, they not having in fact made any advance upon it, as they had engaged to do, and upon the faith of which it was agreed to be deposited with them, there was nothing to divest the original right subsisting in the consignors to stop the goods *in transitu*, upon the insolvency of the consignee, who remained debtor for them.—Then as to the beef. I should be very sorry if any thing fell from the Court which weakened the authority of *Lickbarrow v. Mason*, as to the right of a vendee to pass the property of goods *in transitu* by indorsement of the bill of lading to a *bona fide* holder, for a valuable consideration, and without notice. For as to *Wright v. Campbell*, though that was the case of an indorsement of a factor, it was an outright assignment of the property for value: *Scott*, the indorsee, was to *sell* the goods, and indemnify himself out of the produce, the amount of the debt for which he had made himself answerable. The factor at least purported to make a *sale* of the goods transferred by the bill of lading, and *not a pledge*. Now this was a direct *pledge* of the bill of lading; and not intended by the parties as a *sale*. A bill of lading indeed shall pass the property upon a *bona fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended; but it cannot operate further. Now if the factor had been in possession of the goods themselves, and had purported to sell them to the defendants *bona fide*, the property would have passed by the delivery; but not if he had only meant to *pledge* them, because it is beyond the scope of a factor's authority to *pledge* the goods of his principal. The *symbol* then shall not have a greater operation to enable him to defraud his principal than the actual possession of that which it represents. The principal who trusts his factor with the power to sell absolutely, shall so far be bound by his act; but the defendants shall not extend the factor's act beyond what was intended at the time; and here only a pledge was intended, which he had no authority to make. I consider the indorsement of a bill of lading, apart from all fraud, as giving the indorsee an irrevocable, uncountermandable right to receive the goods; that is, where it is meant to be dealt with as an assignment of the property

1805.
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 NEWSOM
 against
 TH. ORNTON.

[41]

in

1905.

NEWSOM
against
THORNTON.

in the goods; but not where it is only meant as a deposit by one who had no authority to do so; and having been dealt with in this case only as a deposit, it cannot be made into a sale, in order to give it effect.

[42]

GROSE, J. I agree entirely with what my Lord has said respecting the two bills of lading of the pork and beef. With respect to the latter, it would be very extraordinary that a bill of lading, sent to a factor, should be able to confer upon him more power over the property than the possession of the thing itself. It is admitted, That a factor cannot *pledge* the goods of his principal by delivery of the goods themselves: then is it not inconsistent to say that he may do so by delivery of the bill of lading? If his delivery of the goods themselves as a pledge will not pass the property, much less shall his delivery of the bill of lading operate in that manner.

LAWRENCE, J. The question is, Whether if a factor have no property in the goods of his principal so as to dispose of them otherwise than according to the authority delegated to him, namely, by sale, he can have a greater disposing power over them by means of his possession of the instrument, which gives him authority to receive them, than the possession of the goods themselves, when received, would give him? In *Wright v. Campbell*, the Court only said, That if it were a *bona fide sale*, it should bind the principal: they did not go the length of saying, That a *factor* could *pawn* the bill of lading received from his principal. In the case of *Lickbarrow v. Mason*, some of the Judges did indeed liken a bill of lading to a bill of exchange, and consider that the indorsement of the one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was drawn; but

[43]

when the case was before the Exchequer Chamber, there was much argument to shew, that in itself the indorsment of a bill of lading was no transfer of the property, though it might operate as such in the same manner as other instruments may be *evidence* of the transfer of property. As if goods be sold by a merchant abroad to his correspondent here, and the bill of lading be sent to him indorsed, to deliver the goods to the vendee or his order: there the transfer of the goods may be evidenced by such indorsement; and if
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the vendee part with the property in the goods while they are yet *in transitu*, and before his property in them is divested by the vendor's stopping them *in transitu*, and which assignment of the vendee's property may be evidenced in like manner by his indorsement to another, then, according to *Lickbarrow v. Mason*, the original vendor's right to stop them *in transitu* would be divested. Therefore, all that that case seems to have decided is, That where the property in the goods passed to a vendee, subject only to be divested by the vendor's right to stop them while *in transitu*, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration, and *bonafide*, and by indorsement of the bill of lading giving him a right to recover them. And in this case there is no ground to complain of the defendant's having been deceived by means of the bill of lading; for it would have been very easy for them to have inquired for the letter of advice which brought it; which would have shewn that *Church* held it as a factor, and not as vendee of the goods: and if persons will neglect all precaution, and advance money on goods without inquiring whether the party had any right to dispose of them, or not, they must bear the loss, if it turn out that he had no authority so to do.

1805.

NEWSOM
against
THORNTON.

LE BLANC, J. I do not know that the trade of the country will suffer much risk by our holding, that in a case where if the goods themselves had come into the factor's hands he could not *pledge* them, he shall not be able to *pledge* them by means of the instrument which gives him authority to receive the goods. Some of the cases, indeed, state the opinion of the Judges generally, that an indorsement of a bill of lading will pass the property; but that must be taken with reference to the circumstances of the case, and is not to be applied to the case of a factor *pledging* the goods of his principal, but to that of a vendor *selling* goods in which he has a property. The cases shew, indeed, that where either vendee or factor intend to *sell* the goods, the indorsement of the bill of lading for that purpose will bind the vendor or principal. The case of *Wright v. Campbell* appears, I think, to be that of a *sale*; for it was agreed that *Scott* the indorsee of the bill should *sell* the goods. But at least we may say of it, that it is not an authority for holding that a factor may *pledge*

[44]

1805.

NEWSOM
against
THORNTON.

pledge the bill of lading, though he could not *pledge* the goods themselves. And our now determining that a factor cannot make such a pledge, will not break in at all upon the doctrine of *Lickbarrow v. Mason*, that the indorsement of a bill of lading upon the sale of the goods will pass the property to a *bona fide* indorsee, the property being intended to pass by such indorsement.

Rule discharged.

[45]

Friday

Jan. 25th.

LAWRENCE and Others against SYDEBOTHAM.

A policy of insurance on a ship on a certain commercial voyage, with or without letters of marque, giving leave to the assured to chase, capture, and man prizes, however it may warrant him in weighing anchor while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him after the sea, and was pursued for about 30 miles, and engaged and captured by the *Tamer*, which carried 18 guns. After this the *Tamer* returned to the coast of *Africa* with her prize, and finished her trading there, and proceeded, on the 15th of *October*, with her cargo and the prize in company, on her voyage to the *West Indies*; in the course of which she for the purpose of protecting her as a convoy into port, in order to have her condemned, though such port were within the voyage insured.

THIS was an action on a policy of insurance on the ship *Tamer* with or without letters of marque, valued at 6000*l.*, and on slaves and goods as interest might appear, "at and from *Liverpool* to the coast of *Africa*, during her stay and trade there; and at and from thence to her port or ports of sale, discharge, and final destination in the *British* and foreign *West Indies* and *America*, with leave to chase, capture and man prizes." The Plaintiff declared upon a loss by the perils of the seas; to which the general issue was pleaded. The cause was tried before *Graham B.* at the last *Lancaster* assizes; and the material question now was, Whether the policy were avoided by a deviation in the course of the voyage? As to which it appeared in evidence that the ship sailed from *Liverpool* upon the voyage insured, and arrived on the 14th of *August*, 1803, off the entrance of the *Congo* River, on the coast of *Africa*, where she found *La Braave*, a *French* trading vessel, with a brig and tender, and anchored within six miles distance of them. The next morning the *Tamer* got under weigh, and came within three miles of the *French* vessel; which soon after stood out to sea, and was pursued for about 30 miles, and engaged and captured by the *Tamer*, which carried 18 guns. After this the *Tamer* returned to the coast of *Africa* with her prize, and finished her trading there, and proceeded, on the 15th of *October*, with her cargo and the prize in company, on her voyage to the *West Indies*; in the course of which she

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leaked very considerably, and after making more and more water from time to time, she finally * foundered at sea; and the crew were saved by the prize *La Braave*, which kept her company all the voyage till she sunk. On this point the captain deposed at the trial, that he received instructions from his owners before the voyage, *to take any ship he might capture under his protection*; in consequence of which he continued with his prize, *and not with a view of receiving from her any protection against the risk of the leak of his own ship*. That several times during the voyage he *shortened sail and lay to*, in order to give the prize time to come up, and in order to keep company with her; and particularly on one occasion when the prize had carried away her fore-top-mast. It was objected by the defendant's counsel, that the ship had deviated from the voyage insured, in two respects; 1st, In weighing anchor off the mouth of the *Congo River*, for the sole purpose of pursuing and taking the prize; 2dly, In shortening sail during the voyage to the *West Indies*, for the purpose of convoying the prize; neither of which, it was contended, was warranted by the liberty given in the policy "to carry letters of marque," and "to chase, capture, and man prizes." But the learned Judge's opinion inclining in favour of the plaintiff upon the construction of the policy in both respects, he directed the jury accordingly; and they found a verdict for the plaintiffs.

1805.

LAWRENCE
against
SYDEBOTHAM.

*[46]

The letters of marque recite an order by the King in Council, "That all ships that shall be commissioned by letters of marque and general reprisals, &c. shall and may lawfully seize and take the ships, vessels, and goods belonging to the *French Republic*, &c. and bring the same to judgment in the High Court of Admiralty, within the King's dominions, for proceedings and adjudication and condemnation to be thereupon had," &c.: and then reciting that the captain of the *Tamer* had "given sufficient bail, with sureties, to the King in the High Court of Admiralty, according to instructions made the 17th of *May*, 1803, a copy of which was given to" the captain, it proceeds to authorize the captain to set forth the ship *Tamer* in a warlike manner, to *sieze and take the ships, &c. of the French republic, &c.* "and to bring the same to such port as shall be most convenient, in order to have them legally adjudged in the High

[47]

1805. Court of Admiralty of *England*, or before the judges of such other Admiralty Court as shall be lawfully authorized within the King's dominions: which ships, &c. being finally condemned, it shall be lawful for the captain to dispose of them," &c.

LAWRENCE
against
SYDEPOTHAM.

[48]

The instructions therein referred to contain clauses of the same import for seizing and taking the enemy's ships, and for bringing them into such port of *England* or some other port of the King's dominions as shall be most convenient for the captors, in order to have the same legally adjudged. And article 3 directs, " That after such ships, &c. shall be taken and brought into any port, the taker, or one of the chief officers, or some other person present at the capture, shall be obliged to bring or send, as soon as possibly may be, three or four of the principal of the company (whereof the master and mate, or supercargo, to be always two) of every ship so brought into port before the Judge of the Admiralty, &c. to be examined upon interrogatories concerning the interest and property of such ship," &c. Art. 5 directs, " That if any ship, &c. of the King or his subjects shall be found in distress, or taken by the enemy, &c. the commanders, &c. of such merchant ships as shall have letters of marque and reprisals, shall use their best endeavours to succour and free the same," &c.; and by art. 11 and 14, " If any commander of a ship, having a letter of marque and reprisals, shall act contrary to these instructions, he shall forfeit his commission, and, together with his bail, be proceeded against according to law, and be condemned in costs and damages, and be severely punished," &c.; and by art. 15, " Security and bail are to be taken in 1500*l.* for a vessel of this description."

In *Michaelmas* Term last an application was made, and rule *nisi* granted, for setting aside the verdict, and granting a new trial, on the ground of the two deviations insisted upon at the trial. Against which

Park, *Topping*, and *Wood*, now shewed cause. This case is distinguishable from *Parr v. Anderson*, now in judgment (*a*) for here there is not only permission given to carry letters of marque, but an express liberty to "*chase, capture,*

(*a*) Judgment was delivered in this case on a subsequent day of the Term, *vide post*, when a new trial was awarded.

and man prizes." This necessarily includes a liberty to deviate for those purposes when in sight at least of an enemy, or a vessel supposed to be such. 1. A liberty to chase must include every act necessary for chasing, such as the weighing anchor was, in this case, where both the captor and her prize were previously lying at anchor near to each other: The anchor was not weighed, nor the ship carried out to sea upon a cruise to look for prizes, but the whole was done in the actual chase of a prize before in sight, and endeavouring to escape. Then, 2dly, The captor was warranted by the directions of his letters of marque and instructions, to accompany his prize to a port where she might be condemned; for that is necessary, in order to perfect the capture which he was at liberty to make. Such a liberty includes every act necessary or proper to give it effect, which either the general marine law or the laws of the captor's country enable him to do. When letters of marque are taken out, it is no longer optional to capture enemy's property or not which is within the belligerent's power to do; the master binds himself under a penalty to capture or destroy the enemy's ships whenever he can; and in case of capture, he is directed to take his prize into port, in order to have it legally adjudged. Then when liberty is given to carry letters of marque, the underwriter virtually consents to incorporate in the policy all the directions contained in them, and in the accompanying official instructions. The captor cannot insure the possession of his prize so well as by keeping her company on the voyage; and he thereby also adds to the security of his own ship. The act done is for the benefit of the underwriter as well as of all other parties concerned in the safety of the ships and crews. The shortening sail was, therefore, no more than a necessary act for insuring the safety of the prize, and ultimately of the captors themselves. If a ship were to shorten sail, in order to relieve another in distress, that could not be deemed a deviation; and this was done in order to lessen the risk of distress, and for the purpose of conducting another ship into a place of safety.

Cockell, Serjt. and Littledale, contra. The evidence in the case does not support the argument built on a supposed case of distress, which may, perhaps, be an excuse for deviation; for the captain disavowed having shortened sail

1805.

LAWRENCE
against
SYMBOTHAN.

[49]

1805.

LAWRENCE
against
SYDEBOTHAM.

*[50]

from any apprehension of danger to his own ship if he left the prize, but that he did it solely for the purpose of protecting his prize according to the instructions which he had received from his owners. Neither was the prize supposed to be in any danger from the seas. By taking upon him, therefore, to *convoy* the prize, and in so doing, to *delay* his own voyage, he plainly increased the risk of the underwriters beyond the terms of the liberty given in the policy, which are to *chase*, *capture*, and *man*. Neither of these include a liberty to *convoy*. So far as the underwriter's risk is increased by any deviation which happens in chasing and making the capture, that he agrees to; and so far as any delay is incurred in the voyage insured by those acts, or by the act of *manning* the prize afterwards, he consents to it: but it is a necessary condition implied in every policy, that the ship shall proceed on her voyage with all reasonable expedition; and, therefore, after the delay incurred within the terms of the liberty given by manning the prize, the assured were not entitled to create further delay by convoying the prize. The very liberty given to *man* the prize, while on the one hand it lessens the force of the captor, supposes that he is not to be encumbered with the further care of it, but that a sufficient number of men will be put on board to navigate and take care of both vessels: and the owner who knows the nature of the adventure, and that he may be required to draft off some of the crew, is bound to provide for such a contingency, at the risk of his policy if he leave his own ship without a sufficient crew. Neither the commission nor the instructions imply, that the captor is to accompany his prize into a port of condemnation, but only that the prize shall be brought; that is, brought by those put on board to take the management of it, into port, in order to be adjudged. Whatever liberties, however, may be given to deviate or delay for particular purposes, they must be strictly confined to those purposes; and, subject to those, the principal object of the insurance is still the safe prosecution of the voyage insured with all proper and ordinary precautions, and all reasonable dispatch: and these collateral licences have always been construed strictly. As where there was a liberty to *cruise six weeks* it was holden to mean six *successive* weeks, and not to cover
a cruising

[51]

a cruising for that time at intervals (a). If the captor were at liberty to convoy every prize into port, the voyage might be indefinitely prolonged by his making successive captures before he reached his ultimate destination. It might be even considered to be most convenient to return with every prize to the port from whence he sailed.

1805.

LAWRENCE
against
SYDENBOTHAM.

LORD ELLENBOROUGH, C. J. The question is reduced to this:—Whether acting as convoy to a prize, and slackening sail in the course of the voyage insured, in order to make the rate of sailing of the capturing ship conform to that of the prize, be within the meaning of the terms introduced into the policy, giving the assured “leave to *chase, capture, and man prizes?*” These terms clearly gave them liberty to do every thing of a *hostile* nature within the scope of them to overcome the resistance, and to take possession of the prize, by sending part of the crew of the captors on board the prize. But liberties of this sort, without giving them an expansion beyond what the parties can be supposed to have contemplated, cannot be extended beyond the plain meaning of the words, as applied to the subject-matter, by adapting them to other circumstances of a voyage known by appropriate terms, and which are not included in the policy. I shall give no opinion at present upon the effect of the general leave to carry letters of marque; it is enough to say, that in this case the parties themselves to the contract have defined what their own meaning was,—namely, to “*chase, capture, and man prizes:*” and upon the principal that, *expressio unius est exclusio alterius*, that will not include a leave to *convoy*. I would however observe, that the words in the letter of marque which have been most relied on, directing the captor to *bring* the prize into port to be condemned, does not mean an actual *bringing* of it in by the master himself, but *causing it to be brought* into port would fully satisfy those words: that is, by putting a competent number of men on board the prize for that purpose. I must not be understood by this to say, that under such a liberty given to *man prizes* the captor may divest his own ship of the number of men necessary to conduct her safely to her port of destination; but that, under it, he may, without laying him-

[52]

(a) Sayers v. Bridge, Dough. 527.

1803.

LAWRENCE
against
SYDEBOTHAM.

[53]

self open to exception on that account, sever some of the men from his crew in order to man the prize. On the short point of the case my opinion is, That a liberty to *chase, capture, and man*, cannot be extended beyond what is necessary for the performance of those acts; and that the *convoying* of the prize afterwards does not necessarily arise out of such a liberty. This does not affect the question how far slackening sail, from motives of humanity, to succour another ship in distress, is allowable; nor is it necessary to touch upon it. Perhaps, when such a case does arise, it may be found to be for the general benefit of all insurers (and, amongst others, consequently for the benefit of those who may raise such an objection) to allow such succour to be given without imputing deviation to the succouring ship. It is not however necessary now to give any opinion on that point. In this case the slackening sail for the purpose of convoying the prize, was a deviation which annuls the policy.

GROSE, J. The question is, Whether the ship insured has done more than she had liberty to do? She had liberty to *chase, capture, and man* prizes; and she did chase, capture, and man a prize. But it appears that afterwards she pursued her voyage, not in the most expeditious manner that she might have done, but she stopped and delayed her voyage, in order to *convoy* her prize into port; and thereby increased the dangers of the voyage insured and the risk of the underwriters. Now a liberty to *chase, capture, and man*, does not imply a liberty to *wait for and convoy* prize. If it had been so intended, another appropriate expression in daily use would have been used, and leave would have been given in terms to *convoy* the prize into port. The words alluded to in the letter of marque, *i. e.* "bring into port," as applied to this policy, may very well mean "properly *manning* the prize, in order to bring her into port." That the dangers of the voyage were increased to the ship insured by convoying the prize, cannot be doubted. It appeared in evidence, that day after day she shortened sail, and thereby protracted the duration of the voyage. This therefore not being covered by the liberty given, amounts to a deviation, and avoids the policy.

LAWRENCE, J. I am of the same opinion as to the construction of the policy. What the captain stated at the trial

trial was true, that he did not wait for the prize under any idea that her presence was necessary to insure his own safety; but it was in order to give her protection. Then the question is, Whether under a liberty which extended the rights of the assured beyond the common terms of indemnity in the policy, namely, “to *chase, capture, and man prizes*,” the assured had a still farther liberty to *convoy* whatever prize he took? It is argued that the object of the voyage insured by the policy could not be effected without it: but there is the fallacy; for though the parties contemplated that the prizes taken were to be brought into port, that was provided for by the liberty to *man* the prizes: it was not necessary that the capturing ship should itself *convoy* its prize into port; it was enough that the captors put a sufficient number of men on board to bring her in; and for this purpose, every ship sailing upon such an adventure, should carry a sufficient supernumerary crew, to be able to man its prize, and to retain a proper number of men for itself,—though perhaps the liberty to man prizes may extend so far as to excuse some reduction of the original ship’s crew rather below what they would otherwise have had on board; for otherwise it seems not necessary to stipulate for such a liberty. But this does not extend to give liberty to *convoy* the prize. As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that was not the case here. The prize was in no distress, so as to make it necessary to keep her company on that account; nor was that the motive of keeping with her. The only accident which befell her, was carrying away her top-mast; which the crew on board replaced without any assistance from the captor’s ship.

LE BLANC, J. This is not a case where two ships kept in company with each other for the sake of mutual protection, or where the one stood in need of humane assistance from the other. Therefore it is not like a case where one ship kept company with, or slackened sail for the purpose of assisting another vessel, which might otherwise be in danger of foundering, and seeing her into a place of safety; but it is the case of a ship wilfully loitering, and not using that dispatch to arrive at her port of destination, which she might have

1806.

LAWRENCE
against
SYDEBOTHAM

[54]

[[55]

1805.

LAWRENCE
against
SYDDEBOTHAM.

have done, in consequence of previous instructions to convoy into port any ship she might capture. Then, Is that liberty necessarily to be inferred from the terms of the policy, which authorized the capturing ship to have a *letter of marque*, and to *chase, capture, and man* prizes? It appears to me that neither the particular words of the policy, nor the terms and conditions of the letter of marque, nor the instructions given with it, require the capturing ship to convoy her prize into port; but she was only required to put men on board the prize, to carry her into port to be condemned. The ship being shewn to have loitered on the voyage, it was incumbent on the assured to shew a good reason for it; but the only reason appearing is, that she loitered, in consequence of previous instructions received by the captain from the assured, to keep with his prize and carry her into port; and that is no excuse within the terms of the liberty given by the policy.

Rule absolute.

[56]

Lord NORTHWICK against STANWAY.

Saturday,
Jan. 26th.

The lord may recover from a copyholder the fine assessed by him on admittance not exceeding two years' value of the tenement, although there be no entry of the assessment of such fine on the court rolls, but only a demand of such a sum for a fine, after the value of the tenement had been found by the homage.

THIS was an action by the lord to recover a fine from his copyholder. The premises were not worth above 20*l.* a year, and the fine was at first assessed at 60*l.* of which an entry was made by the steward on the rolls; but the tenant objecting to it as excessive, the lord brought his action for the 60*l.* in the Court of Common Pleas, and failed in it; that Court considering the fine to be excessive, being more than two years' value. The present action was then brought as upon a re-assessment of the fine at 40*l.* But the only evidence of such re-assessment was, first, the following entry on the rolls, "*Re-assessment of fine.*—Manor of Harrow, &c. The court leet, &c. with the court baron of the Right Honourable John Lord Northwick, lord of the said manor, held on the 11th of April, 1803, before H. J. steward, &c. homage A. B., C. D. &c. At this Court the homage aforesaid, on their oaths, present that the tenement in question (to which the defendant was admitted) is of the yearly value of 20*l.*" &c. And next, a letter or written notice from the steward to the defendant, dated 5 Jan. 1804, before

fore this action brought, in which he informed the defendant, that if she did not pay 40*l.* as a re-assessed fine for the premises, an action would be brought for it without further notice. On this evidence it was objected at the trial at the last Sittings at *Westminster*, that the lord had not entitled himself to the fine, there being no entry thereof on the rolls of the Court, which it was insisted was necessary to entitle the lord to recover it. That the only entry, though entitled a "*Re-assessment of the fine,*" was no more than the finding of the value of the tenement by the homage, which had no authority to assess the fine; but the assessing of the fine was the act of the lord consequential to the presentment of the homage, and that ought to have been entered on the roll as an authority for the tenant to pay it. Lord *Ellenborough*, C. J. however, thought that the demand of the fine made in the name of the lord, being a reasonable and legal fine, was of itself sufficient without any entry on the roll, and directed the jury to find for the plaintiff.

Erskine and *Wigley* now moved for a new trial, on the same ground of objection, which they said was the stronger in this case, because it appeared by the prior entry that it had been the practice in this manor to enter the fine assessed by the lord on the rolls. But being asked by the Court, whether they had any authority to shew that the assessment of a fine must appear on the rolls, they admitted that they had no such authority to produce; but contended, that upon principle it ought to be done, since the only title of the tenant was derived from the rolls of the Court, which ought also to evidence the burdens to which the estate was liable.

LORD ELLENBOROUGH, C. J. The objection has neither principle nor practice to support it. The amount of the fine depends upon the value of the copyhold, where it is not ascertained by the custom. The lord assesses it at his peril; if he assess it too high, he is not entitled to recover it; and the plaintiff having done so in the first instance, he failed in his action. It would be even prejudicial, in some instances, to call upon the lord to enter his fine on the rolls; for very often in indulgence to a particular tenant, the lord takes less than what he would be entitled to; which he could never venture to do if it were afterwards to be turned against him. And certainly it has not been the general practice

1805.

Lord NORTH-
WICK
against
STANWAY.

[57]

[58]

to

1805. to make such an entry, however it may sometimes have been done.

Lord NORTH-
WICK
against
STANWAY. GROSE, J. said, that he had known instances of entries not stating any particular sum assessed for a fine, but only that a certain sum had been offered as a fine, with which the lord was content.

Per Curiam,

Rule refused.

WILLIAM HOLWELL CARR, an Infant, *against* The Earl of
ERROL and Others.

One devised lands to trustees in fee (subject to the uses of a certain term of 1000 years) to the use of *W. H.* for life, second son of the devisor's daughter Lady *E.* subject to the proviso after-mentioned, remainder to trustees to preserve contingent uses during *W. H.*'s life, but to permit him to take the rents, &c. and after his decease to the use of his first and other sons successively in tail male, subject to the same proviso, &c. and in default of such issue, remainder to the use of the third and other sons of Lady *E.* successively in tail male, subject to the same proviso, &c. and in default of such issue, with like remainders, to the second son of Lady *E.*'s eldest son, &c. and in default of such issue, to the use of the devisor's grand-daughter *C. H.* for life, subject to the proviso, &c.; remainder to trustees to preserve contingent uses, &c.; remainder to the use of her first son (the plaintiff) in tail male, with other remainders over; all subject to the same proviso; which was, that "if *W. H.* or either of the persons to whom the estate was limited should become Earl of *E.* the use limited to such person and his issue male should cease and be void, as if such person were dead without issue of his body." The devisor's daughter Lady *E.* at the time of his death had only two sons, her eldest (afterwards Lord *E.*) and the said *W. H.* but she had afterwards a third, who died under age; and the said *W. H.* was let into possession at twenty-three, and had one son; and held, that on the death of his eldest brother without issue, by which event *W. H.* became Earl of *E.* the plaintiff, who was then next in remainder, supposing *W. H.* had in fact died without issue, was entitled under the will to take an estate in tail male possession, subject to the trusts of the term of 1000 years.

* [59]

and

and also for all estates, &c. secured for his said daughters by his marriage settlement. Then, after directing that all his plate and furniture, &c. at his mansion-house at *Etal* (in *Northumberland*) should remain there as heir-looms, he devised the same to his said brother *Robert Carr*, and *Henry Collingwood*, their executors, &c. upon trust, to permit the same to go, together with the said mansion-house, to such person or persons as should from time to time, under his will, become entitled to it, for so long time as the rules of law and equity would permit; and desired that an inventory might be taken of the goods by the trustees; and then devised all his real estates whatsoever and wheresoever unto Sir *W. Blakett* and *W. Trevelyan*, and their heirs, to the use of the said *R. Carr* and *H. Collingwood*, their executors, &c. during the term of 1000 years, upon the trusts after-mentioned, and from and after the end or sooner determination of the said term of 1000 years, and subject thereto, to the use of his grandson *William Hay*, second son of his daughter the Countess of *Errol*, for life, without impeachment of waste, but subject to the provisoes and conditions thereafter contained: and after the determination of that estate in his life, by forfeiture or otherwise, to the use of the trustees and their heirs during the life of *William Hay*, in trust, to preserve the contingent uses thereafter limited; but to permit *William Hay*, during his life, to take the rents and profits: and after the decease of *William Hay*, to the use of the first son of the body of the said *William Hay*, and of the heirs male of the body of such first son; but subject to the provisoes and conditions thereafter contained: and for default of such issue, to the use of the second, third, fourth, and other sons of the body of the said *William Hay*, severally, successively, and in remainder one after another, in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons; but subject to the provisoes and conditions thereafter contained: and in default of such issue, to the use of the third, fourth, fifth, and every other son and sons of the body of his said daughter the Countess of *Errol* lawfully begotten, or to be begotten, severally, successively, and in remainder one after another, in priority of birth, and of the several and respective heirs male of the
body

1805.

—
CARR
against
The Earl of
ERROL
and Others.

[60]

1805.

CARR
against
 The Earl of
ERROL
 and Others.

[61]

body and bodies of all and every such son and sons, but subject to the provisoes and conditions thereafter contained. And in default of such issue, to the use of the second son of the body of his grandson *George Lord Hay*, and of the heirs male of the body of such second son; but subject to the provisoes and conditions therein contained. And in default of such issue, to the use of the third, fourth, fifth, and other sons of the body of the said *George Lord Hay* severally, successively, and in remainder in priority of birth, and of the several and respective heirs male of the body and bodies of every such son and sons; but subject to the provisoes and conditions thereafter contained. And in default of such issue, to the use of his grand-daughter *Lady Charlotte Hay* (afterwards *Lady C. Carr*) for life, without impeachment of waste; but subject to the provisoes and conditions thereafter contained: and after the determination of that estate in her lifetime by forfeiture or otherwise, to the use of the trustees and their heirs during the life of the said *Lady C. Hay*, in trust, to preserve the contingent uses thereafter limited (but to permit her during her life to receive and take the rents and profits); and, after her decease, to the use of the first son of her body, and of the heirs male of the body of such first son; but subject to the provisoes and conditions thereafter contained; and for default of such issue, to the use of the second, third, &c. and other sons of the body of the said *Lady C. Hay*, severally, successively, and in remainder one after another in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons; but subject to the provisoes and conditions thereafter contained. And in default of such issue, to each of the said testator's other grand-daughters by name, being eight in number (sisters of the said *Lady Charlotte Hay*) for their respective lives, in like manner, and with the like limitations to trustees to preserve contingent remainders, and to each of their first and other sons severally and successively in tail male, with remainder in fee to his said daughter the Countess of *Errol*. And as concerning the said term of 1000 years so limited to the said *Robert Carr* and *Henry Collingwood*, upon trust to permit his said daughter the Countess of *Errol* (in case his said grandson *Wm. Hay*, and every other person to whom an estate for life or in tail was thereinbefore limited, should so long be under

under the age of 23 years) to occupy and receive for her own use the rents and profits of his said capital mansion-house, with certain lands therein particularly described, she taking * care of the plantations and keeping the house in repair. And upon further trust, that in case his said grandson *Wm. Hay*, or any other person to whom an estate for life or in tail was thereinbefore limited, should attain the age of 23 years in the lifetime of his daughter *Lady Errol*, then the trustees should put the said *Wm. Hay*, or such other person attaining the age of 23 years, into possession and receipt of the rents and profits of the said capital mansion and grounds; and that from and after such possession taken, the said term of 1000 years should determine. And in such case he directed, that his grandson *Wm. Hay*, or such person as from time to time should be in possession of his real estates under his will, should pay to his daughter *Lady Errol* an annuity of 400*l.* for her life, to be issuing out of all his lands; and upon further trust, that in case *Lady Errol* should die before his grandson *Wm. Hay*, or other person entitled, &c. would have attained the age of 23 years, then the trustees should let the said mansion-house and grounds until such event happened; and that in the mean time the rents and profits should be applied by the trustees in increase of the funds, and for the purposes thereafter mentioned. And as to the said term of 1000 years with respect to all other the testator's real estates, upon trust that the trustees should, after his decease, receive the rents and profits thereof, until by the interest of the rents and profits, and by his ready money and securities, a fund should be raised sufficient to pay his debts, legacies, and also the annuities thereafter provided for his daughter *Margaret Mackay*, his sister *Jane Carr*, and his said grandson *Wm. Hay* (which payments the trustees were directed to make); viz. to his daughter *Margaret Mackay* an annuity of 360*l.* and to his sister *Jane Carr* a like annuity of 50*l.* for her life; and that there should be paid out of the said fund, for the use of his said grandson *Wm. Hay*, the several yearly sums therein mentioned until he should attain the age of 23 years. And he further directed, that after a fund sufficient to pay his debts, &c. should have been so raised, the said trustees (in case his daughter *Lady Errol* should be then living, and his grandson *Wm. Hay*, or other person entitled,

1805.

CARR
against
The Earl of
ERROL
and Others.

[62]

[63]

&c.

1805. &c. should then be under the age of 23 years) should permit Lady *Errol* to receive the rents and profits of the said real estates until her decease, or until his said grandson or such other person as aforesaid should attain the age of 23 years, and no longer. And that in case at the time when a fund sufficient to pay his debts, legacies, and annuities, should have been raised, his daughter Lady *Errol* should be dead, and his grandson *Wm. Hay*, or other person entitled as aforesaid, should be under the age of 23 years, then the trustees should receive such rents and profits until his said grandson, or other person entitled as aforesaid, should attain the age of 23 years, and place out the money at interest, and pay and transfer all the said monies and securities to his said grandson, or such other person as last-mentioned, at the age of 23 years; provided also, that when all the trusts of the said term of 1000 years should be performed, then the said term should determine. The will also contained a proviso, empowering *Wm. Hay*, when in possession of the estates, to jointure a wife with a rent-charge not exceeding 80*l.* a year for every 1000*l.* he should receive with her. And also another proviso, empowering *Wm. Hay*, and Lady *Charlotte Hay*, and the other tenants for life, when in possession, to grant leases for any term not exceeding 12 years, at the most improved yearly rents, and under such conditions as therein mentioned; and also another proviso, declaring that the said premises were so devised and limited to his said grandson *Wm. Hay* for life, and to his first and every other son, and the heirs male of their respective bodies, and to the third and every other son of his daughter Lady *Errol*, and the heirs male of their respective bodies, and to the second and every other son of *George Lord Hay*, and the heirs male of their respective bodies, and to Lady *Charlotte Hay*, and to his other granddaughters (by name) for their lives, and to their respective first and every other sons, and the heirs male of the respective bodies of such sons, upon express condition, that within six months after they should respectively come into, and while they continued in possession of the premises, they should take the surname and bear the arms of *Carr*; or the person refusing or neglecting so to do, should not take any benefit, estate, or interest under his will, but the next in remainder should take, &c. as if the person so refusing was actually

CARR
against
The Earl of
ERROL
and Others.

[64]

actually dead; provided that such person in remainder so taking, &c. should assume and continue to bear the surname and arms of *Carr* in manner aforesaid. The will also contained the following proviso: "Provided further, and it is my express will and meaning, that in case my grandson *Wm. Hay*, or his first or any other son, or the issue male of their respective bodies, or the third or any other son of my daughter *Lady Errol*, or the issue male of their respective bodies, or the second or any other son of *G. Lord Hay*, or the issue male of their respective bodies, or my granddaughter *Lady Charlotte Hay*, &c. or their respective first or any other son, or the issue male of their respective bodies, or any of them, shall at any time hereafter become entitled in possession to the premises hereby devised by virtue of the limitation aforesaid, and the said person or persons become so entitled, shall then or at any time afterwards be or become entitled to the title of Earl of *Errol*, or Countess of *Errol*, or any higher title which my son-in-law the now Earl of *Errol* or his heirs may hereafter become entitled to, then, and in every such case, and from thenceforth, the use and estate hereby limited to every such person or persons so being or becoming entitled to the said title, or any higher title as aforesaid, and to his, her, or their respective sons or issue male, of and in the said hereby devised premises, and every part thereof, shall cease, determine, and be utterly void to all intents and purposes whatsoever, as if such person or persons was or were dead without issue of his, her, or their respective body or bodies. And in every such case the said hereby devised premises shall go and remain to and to the use of, and shall be immediately vested in the person or persons who by virtue of the limitations aforesaid should be next in remainder to such person or persons so becoming entitled as last mentioned, in case he, she, or they was or were dead without issue male of his, her, or their bodies." The testator appointed his daughter *Lady Errol* executrix; and he afterwards made a codicil, which did not affect the disposition of real estates, and died in 1777, leaving *Lady Errol*, who proved the will, and *Margaret Mackay*, now *Farquharson*, his daughters and co-heiresses at law. At the time of the date and execution of the will, and of the death of the testator, his daughter *Lady Errol* had issue two sons and no more; viz. the said *George Lord Hay*, her

1805.

CARR
against
The Earl of
ERROL
and Others.

[65]

eldest

1805. eldest son, then under age, and the said *Wm Hay*; but
 ——— in 1778 she had issue a third son, *James Hay*, who died in
 Carr against 1797, at the age of 19 years. At the decease of the testator,
 The Earl of *Wm. Hay*, the second son of Lady *Errol**, was an infant
 ERROL and Others. five years old, and consequently the trustees of the term of
 * [66] 1000 years, or the Earl and Countess of *Errol*, with their
 concurrence, entered into possession of the testator's man-
 sion-house, with the heir-looms therein, and into the re-
 ceipt of the rents and profits of all other the real estates of
 which the testator was seised at the time of his death; and
 they, or one of them, continued in such possession and re-
 ceipt until 1795, when *Wm. Hay*, having attained his age of
 23 years, and the several sums directed to be raised under
 the trusts of the term of 1000 years having been satisfied,
 was let into possession of the mansion-house, with the heir-
 looms and furniture therein, and into receipt of the rents
 and profits of all other the testator's real estates. *James*,
 Earl of *Errol*, the husband of the testator's daughter, Lady
Errol, died in 1778, and at his decease, *George Lord Hay*,
 his eldest son and heir at law, became Earl of *Errol*. In
 1798, *George*, Earl of *Errol*, the testator's grandson, died
 without issue, leaving *Wm. Hay*, his brother and heir at law,
 who thereupon became, and now is, Earl of *Errol*. At the
 death of *George*, Earl of *Errol*, *Isabella*, Countess of *Errol*,
 the testator's daughter, not having any issue male, except
William, now Earl of *Errol*, and his eldest son, *James*,
 Lord *Hay*, Lady *Charlotte Hay*, who had intermarried with
William Holivell, clerk, (who afterwards took the name and
 arms of *Carr*, by virtue of his Majesty's licence granted to
 him and his heirs) claimed to be entitled to the possession of
 the estates by virtue of the last-mentioned proviso, in the
 same manner as if *Wm. Hay* (now Earl of *Errol*) was dead
 without issue male; but Lady *Charlotte* and her brother, the
 present Earl, agreed that he should continue in the receipt of
 the rents and profits of the estates, and that the rents should
 be divided equally between them; and which was so done to
 [67] the time of the death of Lady *Charlotte Carr*, which happened
 in *February*, 1800, when she left an only son, the present
 plaintiff, then above a year old. It being considered on the
 part of the infant, that by virtue of the proviso in the testa-
 tor's will, he became entitled on the death of his mother to
 the rents and profits of the estates, as tenant in tail under
 the

the limitations of the will of the testator, a bill in Chancery was filed in *Easter Term*, 1801, in the name of the plaintiff by his next friend, against the parties, stating the matters aforesaid, and praying that the plaintiff might be declared, in the events that had happened, to be entitled to the heirlooms and the real estates of the testator devised by his will; and that *Wm. Earl of Errol* might be decreed to deliver up possession thereof, and for further relief. To this bill the defendants put in their answers, and admitted the facts generally stated in the bill, and particularly the will of the testator, and the death of *George*, Earl of *Errol*, without issue, and that thereupon the defendant, the present Earl, succeeded to the title and estate of his brother; but the defendant, the Earl of *Errol*, insisted that the real estates of the testator were vested in the trustees to preserve contingent remainders for the benefit of himself during his life. A receiver was appointed to collect the rents and profits, and pay them into the bank without prejudice; and a case was directed to be made by the Lord Chancellor for the opinion of this Court upon the question, Whether the plaintiff, *Wm. Holwell Carr*, was, under the will of the testator, Sir *Wm. Carr*, entitled at law to any, and what estate in possession in the premises in question, subject to the trusts of the term of 1000 years created by the will of the testator?

1805.

CARR
againstThe Earl of
ERROL
and Others.

Dampier, for the plaintiff, contended, that the plaintiff, in the event which had happened of the title of Earl of *Errol* having devolved upon *Wm. Hay*, took an estate tail in possession, such devolution of the title being by the express terms of the *proviso* in the will, equivalent to the natural death of *Wm. Hay*, without issue male. Whether the trustees took a vested or contingent remainder under the will; yet in this event it cannot take effect in possession, without violating the whole intention of the testator. What would have been the case if *Wm. Hay* had determined his estate by forfeiture, is another question. The general intent is plain, that no person who was Earl of *Errol* should ever have any beneficial interest in the *Carr* estate: yet to exclude the plaintiff's claim it must be contended, that though *Wm. Hay* had only a life estate, subject to be defeated upon the devolution of the Earldom of *Errol* upon him, yet he shall have the same beneficial interest now he is Earl of

[68]

1805.

CARR
against
The Earl of
ERROL
 and Others.

Errol which he had before. The proviso says, that if *Wm. Hay*, or any other taker of the estate under the several limitations in the will, should thereafter become Earl of *Errol*, the use and estate limited to every such person shall cease, and be utterly void to all intents and purposes, *as if such person were dead without issue, &c.* Now if *Wm. Hay*, the present Earl of *Errol*, were dead without issue, the trustees to support the contingent remainders would not be the next in remainder, but the plaintiff would certainly take; then *Wm. Hay* cannot be dead to one intent, as he must be taken to be under the proviso, and alive to another intent, in order to take under the prior limitation to him, naturally dead as to the cessor of his estate, but not naturally dead, so as to take the rents and profits. The case of [69] *Doe d. Heneage v. Heneage*, (a) will be relied on by the defendants; but it differs materially from this. There, one devised to his son *George* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *George* in tail male; remainder over: with a proviso, that if his son *George*, or any son or sons of his, should succeed to his uncle's estate, the limitation to him, or any son or sons of his so come into possession, &c. should cease, and the next in remainder should take as if his son *George*, or any such son or sons of his were dead: and upon *George's* succession to his uncle's estate before he had a son, it was holden that the limitation to the trustees took effect so as to support the contingent remainders during *George's* life. Now there the testator's intention would have been wholly defeated, and both estates vested in the eldest son of *George* to the exclusion of his second son, if the limitation to the trustees had not taken effect; whereas here it appears that the testator's intent would be defeated by such a construction. The principles and reasoning of Lord *Kenyon*, in giving judgment in that case, would also apply to govern this; but the circumstance of the Lord Chancellor's sending this case for the opinion of the Court shews his own doubts upon that doctrine, and his desire to have it reviewed. The words too of the proviso are stronger in this case than in the former one. The devolution of the

(a) 4 Term Rep. 13.

title is not only annexed to the cessor of the estate in possession, but to the vesting of the succeeding one. And in *Doe v. Heneage* the proviso was, that in the event contemplated the next in remainder, "according to the uses of this my will," shall succeed, &c. which words are not in the present case. But it may be said that the estate to the trustees is not made subject to the *proviso*. It is not in words indeed, but it must be so in effect. The whole will must be taken together. Their estate would have taken effect on the determination of *Wm. Hay's* life estate by forfeiture, or if he did not take the name of *Carr*, or if he did any act inconsistent with the nature of a life estate; but the estate could not vest in them upon the event of the devolution of the title of *Errol* on him, because that was to operate as if he were *naturally dead*, and their estate was only limited *for his life*; therefore it must vest in the next in remainder, as in case of his natural death without issue male. It is an exception arising necessarily from the whole context of the will, all of which is governed by the *proviso*. If then in this event *Wm. Hay's* life estate be gone, it would be very absurd and inconsistent to say that the permission to the trustees to let him take the rents and profits during his life applied to this case. [*Le Blanc, J.* It must be argued on the other side, that *Wm. Hay* loses the estate, because he is in the same situation as if he were naturally dead, and yet that the trustees are to take the estate as if he were alive.] The very trust annexed to the estate of the trustees, that they should permit him to take the rents and profits during his life, shews that the testator could not have intended their estate to vest in possession in the event marked in the *proviso* for the estate to go over to the next in remainder; for it could never be meant that *Wm. Hay* should lose the estate by the testator's own condition annexed to it, and yet receive the rents and profits. Besides, the estate of the trustees to preserve contingent remainders does not attach on the estates tail, but only on those for life; and therefore if the title of *Errol* were to devolve on the plaintiff, it must be admitted that his estate would be divested immediately: yet it cannot be supposed that the testator meant that the tenants for life should be in a better situation than the tenants in tail, in respect of the rents and profits of the estate. It may be said

1805.

—
CARR
against
The Earl of
ERROL
and Others.
[70]

[71]

1805.
 —
 CARR
 against
 The Earl of
 ERROL
 and Others.

that there are contingent remainders to the third, fourth, and other sons of the testator's daughter, the Dowager Countess of *Errol*, and that the estate given to the trustees was necessary for the purpose of supporting those remainders; but the testator did not regard who was next in remainder at the time of the devolution of the title of *Errol* on any of the persons to whom his estate was limited, but only that the estate should in that event go over immediately to the next in remainder, whoever he might be.

Holroyd, contra. The question here is not What estate the Earl of *Errol* has? but Whether the plaintiff be entitled to recover the possession? for if he be not, it is immaterial what is to become of the rents and profits in the hands of the trustees during the life of the Earl, that being a question for the Court of Chancery hereafter to determine. Then, as to the legal estate, the case of *Doe v. Heneage* (a) is directly in point for the claim of the trustees. All the limitations to *Wm. Hay*, and the other persons of his family, are made subject to the proviso, but not the limitations to the trustees to preserve contingent remainders during the life of each tenant for life: which pointed omission shews plainly the intention of the testator that the estate of the trustees should in no event be subject to the condition therein contained: but unless the trustees are to take during the life of *Wm. Hay*, on whom the title of *Errol* has devolved, all the contingent remainders will be defeated, which it clearly was the object of the testator to uphold: for it is not until default of the issue male of his daughter generally, that the estate is given over to Lady *Charlotte Hay*, his granddaughter: but by the construction contended for, any younger son of his daughter born after the title devolved on *Wm. Hay*, would be excluded from taking. [*Lawrence, J.* Little or no stress can be laid on the omission of subjecting to the proviso the limitations to the trustees; for it would be absurd to suppose that the testator looked to the contingency of either of them or their heirs becoming Earls of *Errol*. Lord *Ellenborough, C. J.* It being a peerage in fee, there was only a bare possibility that the title might devolve on any of the heirs of the trustees. *Le Blanc, J.* Suppose,

[72]

(a) 4 Term Rep. 13.

however,

however, that the proviso had been annexed to the limitation to the trustees as well as to the other limitations, what would have been the effect of it upon this question?] Nothing more than to shew that the testator's intention was, that the limitation to them might be forfeited in that event as well as the others. The testator on the whole of the limitations and the proviso taken together had two intents, both of which cannot be carried into effect; one, That the estate should never be possessed by any person entitled to the Earldom of *Errol*; the other, That all the issue male of his daughter, not Earls of *Errol*, should be preferred before the estate went over to Lady *Charlotte Hay* and her issue; which latter event could not be insured without the intervention of that estate of the trustees which is now sought to be defeated. Supposing the title had come to *Wm. Hay* soon after the testator's death, when by probability his daughter might afterwards have had other sons born, they would all have been excluded according to the plaintiff's argument, manifestly contrary to the testator's intent; and it would be a very strained construction of the will to say, that he intended that the limitation to the trustees should be destroyed by the operation of the proviso, when the testator anxiously omits to annex it to the limitation to them, when it is annexed expressly to the antecedent and subsequent limitations. Then, as to the subsequent words relied on in the proviso, that in the event of the devolution of the title of *Errol*, on any person to whom the estate was limited, it should go over, as if such person were *dead without issue*; as that could not be without destroying the contingent remainders, which it is evident he meant to preserve by the interposition of the estate to the trustees, those words must necessarily receive such a construction as is consistent with the other parts of the will, and with his declared intent to preserve the contingent remainders. In *Roe d. Dodson v. Grew*, Lord C. J. *Wilmot* (a) observes, that the event of *George Grew's* (the first taker) dying without issue male would not vary the construction of the will; which was to be considered in the same manner as if he had, or might have had, many sons, &c. So here

1805.

CARR
against
The Earl of
ERROL
and Others.

[73]

(a) *Wilmot's Rep.* 275. 2 *Wils.* 327. 8. C.

1805.
 ———
 CARR
 against
 The Earl of
 ERROL
 and Others.

[74]

the will is to be construed as if the testator's daughter, Lady *Errol*, might have had many sons after the devolution of the title of *Errol* on *Wm. Hay*, all of whom it was his intention to prefer to Lady *Charlotte Hay*; which intent can only be secured by the trustees taking. [Lord *Ellenborough*, C. J. How do you argue that we are to discover which was the primary intention of the testator? whether that, on the devolution of the title of *Errol* on any taker of the estate, it should immediately go over to the next in remainder, as if that person were dead without issue, or that it should in no event go over to Lady *Charlotte Hay*, so long as by legal possibility his daughter might have issue male capable of taking?] The latter appears to be the primary intention, from the caution which the testator has used to exempt the limitation to the trustees alone from the operation of the proviso, and to avoid the destruction of the contingent remainders in the event which has happened. But if the intent were only doubtful, there is nothing left for the Court but to abide by the strict words; for the words of a will must prevail, unless the Court see a plain intent to the contrary, according to Lord C. J. *Wilmot's* opinion in the case last cited. This case is even stronger in favour of the limitation to the trustees taking effect, than that of *Doe v. Heneage*; for there the proviso in the terms of it applied generally to the whole will: here there is an express distinction as to the estate limited to the trustees.

Dampier, in reply observed, That there was no occasion to subject the limitation to the trustees expressly to the proviso; because, if the estate given to *Wm. Hay* were to go over to the next in remainder upon the event of the title of *Errol* devolving on him, in the same manner as if he had died naturally without issue male, the estate never could vest in possession in the trustees for a moment, and therefore the proviso could not apply to them. The intent plainly was to substitute the devolution of the title on any possessor of the estate in the case of his natural death without issue male; in which event it cannot be denied but that the plaintiff would be entitled.

[75]

LORD ELLENBOROUGH, C. J. then said, That the case of *Doe v. Heneage* appeared to bear strongly upon this, though this case was much stronger than that. It was therefore

therefore proper, out of respect to the very learned Judge by whose advice principally that case was decided, that they should consider of the matter before they certified their opinion.

The following certificate was, in this Term, sent to the Lord Chancellor:—

“We have heard this case argued,—we have considered it; and are of opinion, that the plaintiff *William Holwell Carr*, is, under the will of the testator Sir *William Carr*, entitled at law to an estate in tail male in possession, in the premises in question, subject to the trusts of the term of 1000 years created by the will of the said testator.”

12th Feb. 1805.

ELLENBOROUGH.

N. GROSE.

S. LAWRENCE.

S. LE BLANC.

WOOTTON *against* HARVEY, Clerk.

1805.

CARR
against
The Earl of
ERROL
and Others.

Saturday,
Jan. 26th.

IN trespass for seizing and taking a horse of the Plaintiff on the 28th of November, 1803, and detaining it till he paid 5*l.* 17*s.* 4*d.* it appeared at the trial before *Runnington*, Serjt. in *Kent*, that one *J. Broad*, who had been a servant of the plaintiff, was drawn for the army of reserve; and certain wages being due to him for the time * he had served with the plaintiff, which the latter refused to pay, he applied to the Defendant, a magistrate of the county of *Kent*, who, after summoning the plaintiff, and hearing the complaint, by his order of the 8th of August, 1803, directed such wages to be paid by the plaintiff. Against this order the plaintiff appealed to the next Sessions, which confirmed the order on the 7th October following. In the intervening month of September, *Broad's* mother, who was examined as a witness in this cause (*Broad* himself being absent with his regiment) (admitting that her son had not left any directions with her to receive the wages, but saying that before his departure he had gone with her to the defendant's house for the purpose

peal; and also 21 days after such appeal dismissed before the warrant of distress issued, the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal.

1805.
 WOOTTON
 against
 HARVEY.

[77]

of receiving them from (a) him) having met the plaintiff in *Ramsgate*, asked him if he had paid her son's wages; to which he answered in the negative, and that he did not intend to pay them unless he was forced. The constable then proved, that after having carried several notes from the defendant to the plaintiff to pay the wages of his late servant *Broad*, which he, the defendant, had ordered him to do, he received from the defendant the warrant of distress, dated 28th November, 1803, under which he distrained the plaintiff's horse till payment of the money; having previously to the making the distress demanded the money of the plaintiff, which he refused to pay. The warrant of distress stated, that it appearing to the defendant that the plaintiff had had due notice of an order which he (the defendant) had made on the 8th of August preceding for the payment of wages to *J. B.* his late servant, it therefore authorized the constable to distrain for their non-payment. On this evidence, it was contended for the plaintiff, that under the stat. 42 Geo. 3. c. 90. s. 61 (b) a demand of the wages adjudged by the order of the justice should be made by the party himself, or some person properly authorized by him to receive them, previous to the issuing of any warrant of distress; and that here there was no evidence of such a demand by any person so authorized to receive the wages. The learned Serjeant, however, held that no such demand was necessary under the statute; and that even if it were, in general, the necessity of making it had been waived in this instance by the proof of an absolute refusal to comply with the adjudication. The plaintiff was thereupon nonsuited, with leave to move the Court to set aside the nonsuit, and enter a verdict for the plaintiff, if

(a) The mother also swore that her son had desired Mr. Harvey to receive the wages for him. But the Court considered that as mere hearsay, and no evidence: it was no part of the *res gestæ*, as contended for by the defendant's counsel, but a relation of what the son had before said.

(b) The stat. 42 Geo. 3. c. 90. enacts, s. 62. That if any servant shall be enrolled as a militia-man under that Act, it shall not vacate his contract with his master, &c. but there shall be an abatement from his wages in proportion to his absence, to be settled by a justice of peace. "And it shall be lawful for such justice, on complaint, to examine upon oath every such servant, &c. and to make such order for payment of so much wages, &c. as the case may require, &c. And in case of refusal or non-payment of any sums so ordered to be paid by the space of 21 days next after such determination, such justice may and shall issue forth his warrant to levy the same by distress and sale," &c. But it also gives an appeal to the Sessions. This and other provisions of that statute are by stat. 43 Geo. 3. c. 82. s. 44. applied to the army of reserve; out of which this transaction arose.

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the nonsuit were wrong. A motion to that purpose was accordingly made in last *Michaelmas* Term, on the ground that there ought to have been a new demand of the money after the order of Sessions upon the appeal, before the distress was taken. And a rule *nisi* having been granted,

1805.

WOOTTON
against
HARVEY.

Shepherd, Serjt. and *Marryat* now shewed cause; and referring to the words of the Act, said, That there was no occasion in this case to make a demand after the hearing of the appeal, even if in any case that were necessary, as the appeal, when dismissed, and the original order confirmed, was the same as if there had been no appeal; for here there were more than 21 days elapsed after the confirmation of the order of Sessions before the distress was taken; and the distress is given in case of refusal or *non-payment* of the money ordered to be paid for twenty-one days.

[78]

Garrow and *Lawes*, in support of the rule. There was no evidence of any demand made for the money before the distress, by any person authorized by the party himself to whom the money was to be paid, which ought to have been shewn (*a*). A demand by a stranger is a nullity. The party complained of ought to be regularly demanded to do the thing required of him, before he is distrained upon for the non-performance of it. After the order is made, it is to be presumed that he will obey it when called upon; and, therefore, before any distress taken, there ought to be evidence of a demand and refusal. When an appeal is given, that supersedes the original order; and if the money be adjudged to be paid upon appeal, the same presumption arises that the party, after he has ascertained by due course of law, that the money is legally demandable of him will pay it upon demand; and, therefore, before it was levied there ought to have been a demand after the Sessions. Where money is awarded to be paid, there must be a demand before the Court will lend its assistance in a summary way. A distress is a summary proceeding, and is always required to be preceded by a demand. At all events, there should have been an application proved to have been made to the magistrate by the party grieved, and evidence laid before him to shew that there had been either a refusal to pay on demand after

[79]

(a) *Coore v. Callaway*, 1 Esp. N. P. Cas. 115.

1805.
 —
 WOOTTON
against
 HARVEY.

the sessions, or that the money had not been paid for 21 days before the issuing of the warrant of distress, otherwise the magistrate was to presume that the money had been paid.

LORD ELLENBOROUGH, C. J. More than 21 days had elapsed after the appeal was heard, and the original order confirmed, and there was no pretence that the money had been paid, nor was the magistrate to assume that it had. Then, taking it that there had been no payment, the magistrate was warranted in issuing his warrant of distress.

GROSE, J. I see no necessity in this case for making a fresh demand after the appeal, and before the levy.

LAWRENCE, J. A person who is bound to pay money to another is required to find out his creditor, if in *England*, and to tender him the money. The Act directs that the money shall be paid within 21 days after the order made; if it be not paid within that time, the magistrate may enforce the payment by distress. But my doubt is, whether, after the appeal determined, the magistrate should not have been applied to, and the facts laid before him before the execution of the warrant.

[80]

The learned Judge, however, upon adverting again to the report of the evidence, said that his doubt had arisen upon a supposition that the warrant had issued before the appeal; but he now found that it was not till after the appeal, and after the lapse of 21 days subsequent; and, therefore, he agreed that the levy was warranted by the Act of Parliament.

LE BLANC, J. I do not think that any demand was necessary; for the magistrate is required to issue his warrant, in case of refusal to pay the money ordered, or non-payment of it for 21 days. Then the appeal only suspended the execution of the warrant; and I consider that the 21 days began to run from the *order*. Therefore, after the appeal, which confirmed the order, the warrant might issue without any fresh demand.

Rule discharged.

1805.

DOE, on the joint and several Demises of GEORGE and FRANCES his Wife, against JESSON. *Saturday, Jan. 26.*

THIS was an ejectment for a house and a small parcel of land, which was tried before *Rooke, J.* at the last assizes at *Northampton*; and the principal question was, Whether the action were brought in time within the 2d clause of exceptions in the statute of limitations, 21 Jac. 1. c. 16. ? The person last seised of the premises, from whom the lessors of the plaintiff claimed, was one *Thomas Jesson*, on whose death in the year 1777, *David*, his elder brother, took possession of them, and transmitted the possession to the defendant his grandson. *Thomas Jesson* left a son (*John*) and a daughter (*Frances*) him surviving. *John* was baptized in 1767; and after the death of his father, being then about 10 years of age, was put out apprentice to the sea-service by the * parish, and was seen by a witness on his return from his first voyage, about a year after the father's death: soon after which he went to sea again, and had not been heard of since; and was believed to be dead. *Frances*, the daughter, one of the lessors of the plaintiff, was baptized on the 21st of *May*, 1771, and afterwards married *George*, the other lessor. It was contended at the trial by the defendant's counsel, that the ejectment was out of time; for it was uncertain when *John*, the son of *Thomas* the ancestor last seised, died, and that the 20 years given by the statute began to run immediately on the death of *Thomas* in 1777, and consequently expired in 1797; or that if the statute favoured *Frances* the daughter till 10 years after the disability of her infancy was removed, at any rate as she was of full age in 1792, she ought to have brought her ejectment in 1802; and, consequently, this ejectment brought in 1804 was too late. On the other hand, it was contended by the plaintiff's counsel, that supposing *John* to have died abroad, the presumption of his death could not arise till seven years after he was last seen in *England* previous to his going to sea, which would not be till 1785 or 1786, till when the right of entry of the lessor *Frances* did not accrue; and that she had 20 years in which to bring her ejectment after that time; the

Where the ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad within age, held that the daughter was not entitled to 20 years to make her entry after the death of her brother, but only to 10 years; more than 20 years having in the whole elapsed since the death of the person last seised.

[81]

1805.

DOE
against
JESSON.

[82]

the statute having never begun to run by reason of the continuing disability; and, consequently, that this action was well brought. The learned Judge left it to the jury to say when and where *John* died; and observed, that it was fair to presume he had not died in *England*, as none of his family ever heard of his death. And as to the time, that it was incumbent on the jury to find the fact, as well as they could, under the doubt and difficulty of the case (a): that at any time beyond the first seven years they might fairly presume him dead, but the not hearing of him within that period, was hardly sufficient to afford such a presumption. The jury found a verdict for the plaintiff; and that *John* died abroad about the year 1785, 1786, or 1787, but not before. In the last term it was moved to set aside the verdict, and grant a new trial, on the ground that *Frances*, the daughter, was at most only entitled to 10 years for bringing her ejectment after she came of age, which was in 1792, even if she were not bound to have made her entry within 10 years from the death of her brother, from whom she claimed.

[83]

Vaughan, Serjt. and *Reader* now shewed cause. The title of the lessor of the plaintiff, *Frances*, did not accrue until the death of her brother, which the jury found was *not before* 1785; and the first clause of the statute of limitations (b) gives every person 20 years to make their entry after their title first accrued. The second clause was evidently intended to *extend* and not to *limit* the time of entry allowed by the first: because, in the particular cases, it allows 10 years,

(a) Reference was made to the case of General Stanwix and his daughter, who were drowned as they were going to Ireland; where Lord Mansfield required the jury to find, Whether the General or his daughter survived? and to the case of the family who were burnt in the great fire in Cornhill.

(b) 21 Jac. 1. c. 16. s. 1. enacts, that "No person shall make any entry into lands but within 20 years next after their right or title which shall first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."

Sect. 2. "Provided nevertheless, That if any person or persons entitled to such writ, or that shall have such right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of 21 years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons, and his and their heir and heirs shall or may, notwithstanding the said 20 years be expired, bring his action, or make his entry, as he might have done before this Act; so as such person and persons, or his or their heir and heirs shall, within 10 years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said 10 years."

notwithstanding

notwithstanding the said 20 years be expired. The meaning, therefore, was to allow every person at least 20 years after their title accrued, if there were a continuing disability from the death of the ancestor last seised, and 10 years more to the heir of the person dying under a disability; which 10 years are in addition to the 20 years allowed by the first clause. Where, indeed, the bar once begins to run, it may be presumed, in analogy to the statute of fines, 4 H. 7. c. 24. settled in *Doe d. Durore v. Jones*, (a) that no subsequent disability will stop it: but here the disability continued from the death of the person last seised, until after the lessor's title accrued, and the time never began to run during the brother's lifetime. In another view of the case, a difficulty was imposed upon the jury without necessity, in requiring them to find the exact period of the death of the brother of the lessor; which they could not properly do without evidence. It would have been sufficient for them to have found that he continued abroad till his death, and that he died within 10 years before the ejectment brought: and if there were sufficient evidence before them to have raised that presumption, the Court will not send the cause to a new trial when the same verdict ought to be found.

Clarke and *Bramston* were to have supported the rule; but the Court thought that at any rate there must be a new trial.

LORD ELLENBOROUGH, C. J. The time allowed by the statute for making an entry might be indefinitely extended, if the construction contended for by the plaintiff were to be admitted. There is no calculating how far it might be carried by parents and children dying under age, or continuing under other disabilities in succession. The brother, *John*, through whom the lessor of the plaintiff, *Frances*, claims, being under the disability of nonage at the time of his father's death, when his title first accrued, and dying under that disability, it appears to me that the proviso in the second clause of the statute (where resort is to be had to it to extend the period for making an entry beyond the 20 years) required the lessor *Frances*, as heir to her brother, to make her entry within 10 years after his death: and that not having done so, this ejectment was brought too late.

(a) 4 Term Rep. 300.

1805.

DOE
against
JESSON.

[84]

1805.

DOE
against
JESSON.

[85]

The word *death* in that clause, must mean and refer to *the death of the person to whom the right first accrued*, and whose heir the claimant is : and the statute meant that *the heir* of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have 10 years from the *death of his ancestor*, to whom the right first accrued during the period of disability, and who died under such disability (notwithstanding the 20 years from the first accruing of the title to the ancestor should have before expired). As to the period when the brother might be supposed to have died, according to the statute 19 Car. 2. c. 6. with respect to leases dependent on lives, and also according to the statute of bigamy (1 Jac. 1. c. 11.) the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to shew that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him. That was about the year 1778 ; which would carry his death to about 1785.

[86]

LAWRENCE, J. Upon the death of the father *Thomas Jesson*, in 1777, the right descended to *John*, the son, then under age, who died under that disability. The lessor *Frances* is the heir of *John* ; and the statute gives to the party to whom a right of entry accrues, and who is under a disability at the time, 10 years after the disability removed, notwithstanding the 20 years should have elapsed after his title first accrued ; and to his *heir* the statute gives 10 years after the *death* of such party dying under the disability. Here more than 10 years had elapsed after the death of the brother before this ejectment was brought. It appears probable enough, upon looking into the case of *Stawell v. Lord Zouch*, (a) that the word *death* was introduced into the statute of *James*, in order to obviate the difficulty which had arisen in that case upon the construction of the statute of fines, 4 H. 7. c. 24. for want of that word.

Grose and Le Blanc, justices, assenting,

Rule absolute.

(a) Plowd. 355.

ROE,

1805.

ROE, on the Demise of the Earl of BERKELEY, against *Monday, Jan. 28th.*
The Archbishop of York.

THIS ejectment was brought for a messuage and appurtenances in the parish of *St. George, Hanover Square*, in the county of *Middlesex*: and at the trial before *Lawrence, J.* at the sittings at *Westminster*, a special verdict was found, stating in substance as follows:—

John, Lord Berkeley, of *Stratton*, being seised in fee of the premises in question, by indenture dated the 19th of *May*, 1743, demised the same to *J. Lumley*, his executors, &c. for a term of 99 years from *Lady-day*, 1741, at a yearly rent (after the first two years of the term) of 32*l.* payable quarterly on the four most usual feast days, free of all taxes, &c. *J. Lumley* at the same time executed a counterpart of the indenture, and delivered it to Lord *Berkeley*.

* By virtue of this demise, *J. Lumley* entered into and was possessed of the premises; and afterwards assigned the term for a valuable consideration to the Archbishop, the defendant. *John, Lord Berkeley*, by his will dated the 21st of *May*, 1772, devised the reversion of the premises to the use of Mrs. *Anne Egerton* and her assigns for life, or till she should marry; and after several intermediate remainders, remainder to the use of the lessor of the plaintiff for life, with other remainders over. The will also contained a power to the several tenants for life, when they should be respectively in the actual possession of the messuages, lands, &c. devised to them, to lease the same by indenture to any

The mere cancelling in fact of a lease is not a surrender of the term thereby granted within the statute of frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law. Nor is a recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, a surrender by deed or note in writing of such prior lease, is not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though in some instances the acceptance of a

second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and this, even though the second lease be voidable, if it be not merely void. But where tenant for life with a special power of leasing, reserving the best rent, in consideration (as recited) of the surrender of a prior term of 99 years (of which above 50 were unexpired) and certain charges to be incurred by the tenants for repairs and improvements, &c. granted to him a new lease of the premises for 99 years by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her, which new lease was void by the power for want of reserving the best rent: held, That the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life estate of the grantor, contrary to the manifest intent of the parties; and, consequently, that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life, however such second lease might have operated by way of estoppel as against the lessor during her life.

person * [87]

1805.

ROB dem
Earl of
BERKELEY
against
Abp. of YORK.

[88]

person who should be willing to build or to repair any of the same messuages, for any term of years not exceeding 99 years in possession ; but not in reversion or by way of future interest, *so as* upon every such lease there should be reserved *the best and most improved yearly rent, that at the time of making thereof could be reasonably had or gotten for the same*, without taking any fine or income for making any such lease ; and so as in every such lease there should be contained the like clauses, covenants, and agreements, as were usual in building or repairing leases. *John Lord Berkeley* died without altering or revoking his will ; and on the 14th of May, 1784, *Mrs. Anne Egerton*, being by virtue of the said devise seised for life of the reversion and frechold of the premises in question, executed a certain indenture of that date, whereby it was witnessed, that *for and in consideration of the surrender of the said first-mentioned indenture ;* and also in consideration of the great charges and expences which the said Archbishop had been and might be at in repairing and improving the said premises, and of the rent and covenants therein reserved and contained, and thereby covenanted to be paid and performed on the part of the said Archbishop, his executors, &c. she the said *Anne Egerton*, by virtue and in execution of the power and authority therein stated to be given, and reserved to her in and by the said will of *John Lord Berkeley*, of Stratton, deceased, or by any other power in the said *Anne* vested, or to her in anywise belonging, demised the said premises to the said Archbishop, his executors, &c. *habendum, &c.* from Lady-day then last, for the term of 99 years, at the yearly rent of 36*l.* 4*s.* payable quarterly, and clear of all taxes, &c. payable to her for her life ; and after her decease to those in remainder during the term. The Archbishop accepted the last-mentioned lease, and executed a counterpart thereof by signing and sealing the same ; and at the time of the execution of the said last-mentioned lease, the said first-mentioned lease, and the counterpart thereof were cancelled and exchanged ; *i. e.* the original lease was cancelled and delivered by the Archbishop to *Mrs. Anne Egerton*, and now remains cancelled in the hands of the said Earl ; and the counterpart thereof was cancelled and delivered by *Mrs. Anne Egerton* to, and now remains cancelled

in

in the hands of the Archbishop. The jury then found that the indenture of the 14th of *May*, 1784, was not a lease warranted by the said power in the will of *John Lord Berkeley*, of *Stratton*, the rent reserved thereon not being the best that could be gotten, according to the terms of the power. In *May*, 1803, Mrs. *Anne Egerton* died. The special verdict then stated the entry of the lessor of the plaintiff, the eviction of the defendant, and the demise, &c. But whether, &c.

1805.
 Roe dem.
 Earl of
 BERKELEY
 against
 Abp. of YORK.

This case was argued in *Trinity Term* last by *Frcere* for the plaintiff, and *Holroyd* for the defendant; and again in *Michaelmas Term* last by *Bayley*, Serjt. for the plaintiff, and *Gibbs* for the defendant.

Arguments for the plaintiff. The second lease having been granted by Mrs. *Egerton*, the tenant for life, in consideration of the surrender of the first, and the second lease being void under the power for want of reserving the best rent, the question is, Whether, after the death of Mrs. *Egerton*, the original lease can be considered as subsisting, and be set up again against the remainder-man? or whether it must not be considered as destroyed by what took place when the new lease was granted? First, There was a legal and valid surrender of the original lease in fact, and not contravening the statute of frauds. (a) Secondly, It was surrendered in law. 1. There was a direct cancellation of it in fact. If an action had been brought on it, there must either have been a profert, or an excuse for not making one, by stating that it had been cancelled and delivered up by mistake. But there could have been no profert, because it was cancelled and delivered up: and no such excuse could have been made, because it might have been shewn that the Archbishop gave up the first lease with full notice that Mrs. *Egerton* had only a power to lease reserving the best rent, and that she had not imposed upon him. The only cases where cancellation has been holden not to avoid an instrument, have been where it has been done by accident, and not by design, as here. Here there was the *animus cancellandi*. Even before the statute of frauds, there could be no surrender of a thing lying in grant, except by deed, (b) yet it was always considered

[89]

(a) 29 Car. 2. c. 3. s. 3.

(b) Vid. 4. Bac. Abr. tit. Leases, T. p. 218.

1805.

ROE dem.
Earl of
BERKELEY
against
Abp. of York.
[90]*

that the cancelling of a lease of a thing lying in grant, was evidence of a surrender. So the production of a cancelled instrument of a thing lying in livery must be evidence of a surrender since the statute. And this is not contradicted by * the case of *Magennis v. M'Culloch*, (a) because equity would set it up again. [Lord *Ellenborough*, C. J. The opinion of Lord C. B. *Gilbert* in that case was express: That since the statute, a lease for years could not be surrendered by cancelling the indenture without writing:—and that was an opinion judicially delivered by him, subsequent probably to the treatise written by him. There is another case of *Leech v. Leech*, 2 *Chan. Rep.* 100, (b) where an estate before granted by deed was holden not to be divested by cancelling the instrument.] At any rate, the second lease, reciting that the first was surrendered, is a “note in writing, signed by the party,” within the statute; and that agrees with Lord C. B. *Gilbert*’s opinion in *Magennis v. M'Culloch*. Before the statute, such an admission by word of mouth would have been sufficient to operate as a surrender. Any words tantamount to a surrender were sufficient. 2 *Rol. Abr.* 497, 8. *Chamberlain’s case*, 40 *Ed.* 3. 23, 24, (c) and *Sleigh v. Bateman*. (d) The statute of frauds made no alteration but in the evidence; and whatever words were sufficient before, will, if reduced to writing, still operate as a surrender since the statute. In *Farmer v. Rogers*, (e) where this doctrine was confirmed, the indorsement on the mortgage deed did not purport to be a surrender, but only a receipt for money; and yet as coupled with the proviso in the deed that the term should not cease on payment of the mortgage money, it shewed the intention of the parties, and was holden to be a surrender. Secondly, The acceptance of the second lease was a surrender in law of the first. Such is the legal effect of a new lease, if it be to operate during any part of the original term; with only two exceptions; one in case of fraud, as in *Davison v. Stanley*, (f) where a lessor having, while seised in

[91]

(a) *Gilb. Eq. Rep.* 236.(b) In Chancery, 26 *Car.* 2. “The Court declared, though the deed appeared cancelled, yet it was a good deed: and that the cancelling thereof did not divest the estate of the trustees therein named; and that the trust thereby created, ought to be performed.”(c) Cited 1 *Leon.* 280.(d) *Cro. Eliz.* 488.(e) 2 *Wils.* 26.(f) 4 *Burr.* 2210.

fee, made a good lease of 99 years to his tenant: after which, having settled his estate, and taken back only an estate for life with a certain power of leasing, he granted a new lease to the same tenant for 99 years, not according to the power, without notice to him of his limited authority: and this was holden to be no-surrender of the former lease, on the express ground of fraud upon the tenant. The other exception is, where the second lease is wholly void *ab initio*; in which case it is said in *Shepherd's Touchstone*, 301, that *perhaps* it shall not be construed into a surrender of the first. But if the second lease be good to pass any interest at all, though only for a part of the first term, it operates as a surrender of the whole; for there cannot be two concurrent terms of the same premises in the same person. *Shepherd's Touchstone*, 300. *Lane's case*. (a) *Ive's case*. (b) *Thompson v. Trafford*. (c) *Fulmerston v. Steward*; (d) and *Willis v. Whitewood* (e). The true reason of which seems to be, that otherwise the same person would be both landlord and tenant, and the tenant would be his own reversioner of the shortest term, and be entitled to receive rent of himself during that term. Besides which, the very taking of the second lease is an admission by the tenant that there is an ability in the lessor to demise the premises during the period of the first lease, which is inconsistent with it. Then the surrender of the first lease, having been once good, must be good for ever. It cannot be said that the second lease was wholly void *ab initio*; for at the time of making it, Mrs. *Egerton* had an estate for life in the premises, which gave her an absolute power to lease for her own life; and she had a further power of leasing, on certain conditions, to bind those in remainder for 99 years. The second lease then was good against her during her life; and the question is, Whether it were good *at the time* it was granted? and not What effect will it have now? If she had survived the term of the first lease, the Archbishop would have been entitled to hold during her life under the second lease; and she would have been entitled to the increased rent. It cannot then be avoided *ab initio*, but, like a lease for years, by one who is

1805.

ROE dem.
Earl of
BERKELEY
against
Abp. of YORK.

[92]

(a) 2 Rep. 17. (b) 5 Rep. 11. b. (c) Poph. 9. (d) Plowd. 102, 7.
Dy. 102. b. S. C. (e) 1 Leon. 322.

1805.

ROF. dem.
Earl of
BERKELEY
against
Abp. of YORK.

[93]

only tenant for life, it operated to pass an interest during her life, and was not merely good by estoppel, like a lease by one who had no interest at the time in the premises. It makes no difference then that she refers in the lease to her power; for the principle is, That where a lease would be good to pass an interest, it shall not be good by estoppel: and here Mrs. *Egerton* professed to lease not only by her power under the will of *John Lord Berkeley*, but by any other power that she had. The distinction is between a lease *void ab initio*, and one only *voidable*: and all the books shew that the acceptance of a *voidable* lease for part of the same term which the tenant had before, will be a surrender in law of a good and sure lease in the same premises. In addition to the authorities before cited are *Shep. Touch.* 300. 2 *Rol. Abr.* tit. *Surrender*, 495, pl. 6, 7, & 9; and 497, pl. 11 (which cites *Whitley v. Gough*, Dy. 140, pl. 43.) and *Carey's Rep.* 21. *Anonym.* The case of *Mellows v. May*, (a) indeed, as reported in *Croke*, seems to go further, and say, that the acceptance of a *void* lease will yet extinguish a prior good lease: but it is differently reported in *Moor*: but there, though the second lease was holden voidable by the wife if she had survived her husband, yet it extinguished the prior lease. As to the cases which may be referred to *contra*, the first is that of *Wilson v. Sir Thomas Sewell*; (b) where it is said to have been agreed, that if the second lease granted by the prior Master of the Rolls upon the surrender of a former lease made to him, were not good within the power of leasing granted by the stat. 12 *Car.* 2. then the acceptance of such second lease would not have implied a surrender of the former one: but that was an extrajudicial *dictum*; for the second lease was holden to be good; and therefore no question could arise on the revival of the first. The principal case then is *Davison d. Bromley v. Stanley*, (c) which is either distinguishable from the present on the ground of fraud, or if not, is contrary to all the other authorities. There Mr. *Bromley*, being seised in fee, demised for 99 years from 1686; which lease must, according to common computation, have lasted beyond his life. He af-

(a) Cro. Eliz. 874. and *Moor*, 636.(b) 4 *Burr.* 1975—1980.(c) *Ibid*, 2210.

terwards, unknown to his lessee, converted his fee into an estate for life, reserving a certain power of leasing; and in 1693 granted a new lease to his tenant for 99 years, not made according to the power, without communicating to him the alteration in his estate. This therefore was a *fraud* upon the tenant. The only cases cited on this point, besides the last-mentioned, were *Watts v. Maydwell*, (a) and *Lloyde v. Gregory*, (b) which were cases of *void* leases granted pending prior good leases; and the attention of the Court was not drawn to the distinction between leases *void* and *voidable*, nor were other material authorities referred to; Lord *Mansfield* there saying, That the acceptance of a new *void* lease, or *one that the lessee cannot enjoy*, could not shew an intention to surrender the former good one, and would not operate as a surrender of it; and that the reason why it should be an implied surrender totally fails, with other like expressions, must be taken with reference to the facts of the case as applied to a case of *deceit*. But here there was no *deceit*. The lessee knew that Mrs. *Egerton* had only a limited power of leasing, and of course he must be taken to have known, that if the lease were not made in pursuance of the power, it would only be good for her life: he therefore took the chance of her surviving the duration of the original lease. If it had been intended only to have made a partial or conditional surrender, it should have been so expressed.

Arguments for the defendant. First, The mere cancelling in fact of an instrument, will not revoke or divest an estate once vested by transmutation of possession; but such estate must be conveyed by another deed. This is universally true of things lying in livery, according to Lord C. B. *Gilbert*; (c) though it has been holden to be otherwise of things lying in grant; and even that was questioned by Lord C. J. *Eyre*, in *Bolton v. The Bishop of Carlisle*. (d) So *Bro. Lease*, pl. 16. *Moore v. Waldron*. (e) Dr. *Leyfield's* case, (f) explained by *Read v. Brookman*; (g) and *Woodward v. Aston*, (h) shew that a deed, though lost, destroyed, or can-

180

ROE dem.
Earl of
BERKELEY
against
Atty. of YORK.

[94]

[95]

(a) Litt. Rep. 268, 279; and Hutt. 104.

(b) W. Jones, 405; and Cro. Car. 501. (c) Gilb. L. of Evid. 95, 6th edit.

(d) 2 H. Blac. 263.

(e) 1 Rol. Rep. 188.

(f) 10 Rep. 92, b.

(g) 3 Term Rep. 151.

(h) 1 Vent. 296, 7.

1805.

ROE dem.
Earl of
BERKELEY
against
Abp. of YORK.

celled by accident, may still operate to pass an estate or office. So a power of revocation in a conveyance at common law is void, though good in a conveyance to uses, *Co. Lit.* 237, a; and the estate being in the feoffee, he must return it by an independent conveyance; and it cannot be brought back again by a mere power of revocation of the first deed, and consequently not by cancelling it. The statute of frauds can make no difference in this respect. The first section only says, That leases, &c. not by deed, shall only operate to pass an estate at will. But this was by deed, the subsequent destruction of which will not bring the case within that clause. But it is said, That the *recital* in the second lease of the surrender of the first, is a *note in writing* of the surrender within the 3d clause of the statute. But the *recital* of a surrender is not the *surrender* itself, which the statute requires to be by deed, or note in writing. The recital of one deed in another will not supersede the production of the deed so recited. Before the statute, words, *de presenti*, which shewed an intent to surrender *instantly*, would have been an actual surrender; and independent of the statute, this recital would have been *evidence* of a surrender; but now the surrender itself is required to be shewn in writing unless where it is effected by operation of law. In *Farmer v. Rogers*, (a) the words in writing were stronger than here; viz. “*I do discharge the premises*,” &c. the party meaning to do it by that very writing, which was therefore deemed an actual surrender in writing. But merely stating, as here, that the second lease was granted “*for and in consideration of the surrender of the first indenture*,” only supposes a surrender to have been before made, amounting at most to an admission that there had been a surrender; but not even stating that such surrender was by writing, as the statute requires,—the defendant is not estopped, as contended, by his deed from maintaining that the first lease was not surrendered, because every estoppel must be reciprocal, and bind both or neither of the parties. *Co. Lit.* 352, a and b. *Brereton v. Evans*, (b) and *Edwards v. Rogers*; (c) and here Lord Berkeley, being a stranger to the

[96]

(a) 2 Wils. 26.

(b) Cro. Eliz. 700.

(c) W. Jones, 456.

deed,

deed, cannot be estopped by it, and consequently the defendant cannot. Secondly, The acceptance of a new lease, which is void under the power by which it is professed to be granted, cannot operate as an extinguishment in law of the first good lease. The authorities cited, shew that it cannot be so considered on the ground of merger; for that would operate universally; and there are several instances shewn where the first lease is not merged. It cannot so operate on the principle of estoppel, for the reason before-mentioned; nor on the ground of considering the acceptance of the second lease as evidence of the surrender of the first; for that would be a question of fact for the jury to find: whereas, in many special verdicts, the question of extinguishment of the first lease has been left to the Court, as matter of law, arising out of the other facts stated. Now the rule of law has confined the extinguishment of a prior good lease to cases where the second lease was good; at least for the purposes for which it professed to be made at the time, though voidable afterwards by another: and the Court will not be inclined to carry the principle further against the real justice of the case. Here the second lease, considered as one made under the power, which it professes to be, is absolutely void, and not merely voidable. It could not have been made good by the receipt of rent by the reversioner, though the defendant might thereby have become tenant from year to year. *Doe v. Butcher.* (a) It could only have operated even during Mrs. *Egerton's* life by estoppel; because the lessee being estopped as against his lessor, from saying that she had no power to lease, she was equally estopped from denying her own power. But here the remainder-man himself affirms, that the former tenant for life had no such power, and therefore does away the estoppel against the lessee. If a lessee accept from his lessor a second lease, whether for a longer or shorter period than the first, that may be a surrender of the first, provided the lessee take all the interest which the second lease purports to grant: and that will hold equally, according to the authorities, though the second lease were voidable, because till it be avoided, the whole interest which the lease purports to grant is in the lessee; but if the lease be ab-

1805.

ROE dem.
Earl of
BERKELEY.
against
Abp. of YORK.

[97]

(a) Doug. 50.

1805. **ROE** dem.
Earl of
BERKELEY
against
Abp. of YORK.

solutely void, the interest which it purports to pass, never vested in the lessee. Here it is clear that the second lease, as a lease under the power, was absolutely void; though the lessee during the life of Mrs. *Egerton* was entitled to hold under it, because she was estopped from controverting her own deed against him: but it professes to grant a term of 98 years under the power, and that whole interest never passed to the lessee: and there is no authority to shew that a second lease, which did not pass, either absolutely or voidably only, the whole interest which is purported to grant, was yet an extinguishment of a prior existing lease. On the contrary, all the leases cited for the plaintiff shew, that if the second lease be void, and not merely voidable, it does not extinguish the first. One of the instances put in 2 *Rol. Abr.* 495, *pl.* 7, is of a lease by a dean and chapter, not conformable to the statute 13 *Eliz.* where, though it must be admitted that the lease would be so far good as to ensure to the lessee during the life of the dean who granted it,—yet it was holden, That being void by the statute (as against his successor) it should not extinguish a prior good lease. That was resolved in the case of *Flood v. Gregory*, 13 *Car.* in a trial at bar; and with that agree *Co. Lit.* 45, (a) and 1 *Brownl.* 21. Mrs. *Egerton*, in this case, as the dean and chapter in that, had only a power of leasing on certain conditions, and those not having been complied with, the lease did not convey the interest which it purported to do; and therefore though in both instances it would enure by estoppel to uphold the tenant's possession during the life of the grantor, yet it cannot operate to extinguish the former term. It is true that Mrs. *Egerton* had an interest to pass during her life, and so had the dean in the other case; but she does not profess to grant it out of her life estate, but for a long period under the power reserved to her by the will of *John Lord Berkeley*; and the very duration of the term granted, shews that such was her intention. Then, however a surrender of part of a term may operate as a sur-

[98]

(a) Mr. Hargreave's note to p. 43, and note 4. to p. 45, were referred to in the reply as throwing some doubt on the application of these authorities to the present case, inasmuch as it appeared by a MS. note of Lord Hale, that at the period of the case referred to in Rolle's Abridgement, a lease void by the statute was considered to be avoidable even by the dean who concurred in granting it.

render of the * whole where it is so intended, yet where that is not the intention, it is not incongruous with any principle of law, that the prior term may be dormant for a while, and revive again upon a subsequent event; for a surrender may be conditional in law as well as by the express agreement of the parties: and therefore, supposing the second lease to pass an interest during Mrs. *Egerton's* life, it may be implied to have been accepted on condition that the first lease should revive on her death. As in the case of *Mellows v. May*, reported by *Moor*, (a) the acceptance of the second lease by the husband and wife to whom a prior one had been granted, was holden to be a surrender of the first only during the coverture of the wife: which shews that it might have revived again after the death of the husband in her favour. The prior leading cases were however all considered in the cases of *Wilson v. Sir Thomas Sewell*, (b) and in *Davison v. Stanley*; (c) and the doctrine there laid down is directly in point. The former of these is most fully reported in 1 *Blac.*; and what was there said was not extrajudicial, but strictly applicable to the case as it was argued and considered at the time; though the Court also determined it upon another point. Lord *Mansfield* and the rest of the Court thought it perfectly clear, That if the second lease were bad, to effectuate which was the sole purpose of surrendering the first, the first would be set up again. And yet the same objection now insisted upon would have applied there, that though the lease were bad under the power, yet it would enure to pass an interest during the life of the Master of the Rolls, who granted it. Then came the case of *Davison v. Stanley*; which did not proceed on the ground of *fraud* specifically, for none was probably intended, though that was incidentally introduced, in order to shew that the judgment of the Court went according to the justice of the case. The ejectment there was brought by the tenant in tail under a settlement, whose estate could not be affected by any fraud of the tenant for life, as to the legal operation of the second lease. In the language of the Court, good lease must mean "good throughout the term;" and void lease must mean void in the sense used in the case referred to in *Rol. Abr.* as to the in-

1805.

ROE dem.
Earl of
BIRKELEY
against
Abp. of YORK.

[99]

[100]

(a) *Moor*, 636.
(c) 4 *Burr.* 2210.

(b) 4 *Burr.* 1975. and 1 *Blac.* 617.

1805. terest which it purported to grant; for it is clear that the
 Roe dem. lease was good during the life of the lessor. Lord Mans-
 Earl of field said, "I am very clear that the acceptance of this new
 BERKELEY lease, 'which did not pass an interest according to the con-
 against tract,' cannot operate as a surrender of the former." As
 Abp. of York. between these parties, then, the second lease must be con-
 sidered as void *ab initio*. It is a principle of law that *lex nemini*
 facit injuriam; and here the question is not, Whether there
 were a surrender of the first lease *in fact*? but Whether it
 shall be implied *by law*? There will be no hardship on the
 lessor of the plaintiff in suffering matters to remain in the
 state they were in before the second lease was granted; but
 much injustice to the defendant in extinguishing his former
 term when that which was the consideration for it is avoided.

Lord ELLENBOROUGH, C. J. now delivered judgment
 (after stating the special verdict).—The question upon this
 special verdict is, Whether the lease of the 19th of May,
 1743, was determined and put an end to by that of the 14th
 [101] of May, 1784? The affirmative of this proposition has
 been contended for upon the part of the plaintiff on three
 grounds: 1st, That the acceptance of the second lease was
 an implied surrender of the former lease; 2dly, That the
 cancelling of the first lease amounts, of itself, to a surrender
 of the term thereby granted; and 3dly, That the execution
 of the counterpart of the lease of 1784, is a surrender of that
 of 1743, within the provision of the statute of frauds. Upon
 the two last of these grounds, the Court never entertained
 any doubt; for, as it is enacted by the statute of frauds,
 "That no lease of any lands or houses shall be surrendered,
 unless by deed or note in writing, signed by the party or
 his agent thereunto lawfully authorized by writing, or by act
 and operation of law," the act of cancellation, which can in
 "no allowable sense of the words be considered as either a
 deed or a note in writing," cannot since that statute be a
 surrender; nor can the counterpart of the second lease enure
 as such, unless it does so by operation of law; inasmuch
 as it does not purport in its terms to be of itself a surrender,
 having no words in it which denote or can amount to a
 yielding or rendering up of the interest of the Archbishop to
 Mrs. Egerton; but merely recites that the grant of the new
 is partly in consideration of the surrender of the first inden-
 ture

ture (which surrender, however, if any such had in fact been made, ought to have been specially found by the jury) and which fact of previous surrender this recital by no means necessarily imports; for the statement in the counterpart will be sufficiently accurate, if the acceptance of the second lease would by operation of law be a surrender of the former. And indeed this point was not much pressed by either of the gentlemen, who very ably argued this case on behalf of Lord *Berkeley*. But the material ground on which they contended, that the acceptance of the second lease was a surrender of the first, is this: That Mrs. *Egerton* having a life-estate, it was competent to her to make leases by virtue of such interest, independent of the power given to her by the will of Lord *Berkeley* of *Stratton*; and that the lease of 1784 being a good lease, capable of taking effect out of her life estate, was not void *ab initio*, but passed an interest; and being accepted, worked a surrender of the first lease, inasmuch as the two leases could not stand together.—In support of this position, *Co. Lit.* 45 was cited; where it is laid down as to ecclesiastical leases, that though not warranted by the 1st and 13th *Eliz.* they are good against the lessor, if a sole corporation; and, during the life of the head, if made by an aggregate one. And *Whitley v. Gough, Dyer*, 140—6 (where a husband and his wife being seised of an estate tail, the husband made a lease for 18 years to one, who had in the lands demised a term of 99 years, the acceptance of which lease was holden to be a surrender of the prior term, though the wife after the death of her husband avoided the lease made by him) was, together with various other cases, cited to shew, that the acceptance of a voidable lease is a surrender, though the acceptance of a void lease is not; which position the counsel for the defendant did not dispute. On the other side it was contended, that as between the plaintiff, the Earl of *Berkeley*, and the defendant, the Archbishop, the lease must be taken to be void *ab initio*, whatever it might be as between the Archbishop and Mrs. *Egerton*; for that the same instrument may at different times have a different operation. As a lease by a tenant for life, and him in remainder is, during the life of the tenant for life, *his* lease, and the confirmation of the remainderman; and after the death of the tenant for life the lease of

1805.

ROE dem.
Earl of
BERKELEY
against
Abp. of YORK.

[102]

[103]

the

1805. the remainder-man, and the confirmation of the tenant for life. That according to the authority of *Wilson and Sewell*, 4 *Burr.* 1945, and 1 *Black. Rep.* 617, and of *Davison v. Stanley*, 4 *Burr.* 2210, unless the second lease passed an interest according to the contract, it could not operate as an implied surrender: and that those cases further prove, that it is no surrender unless the lessee take all the interest which the second lease purports to grant; which, under Mrs. *Egerton's* lease the Archbishop certainly did not do. In support of which position a case from 2 *Rolle's Abr.* 495, letter F. p. 7, was relied on; where it was laid down, That a lease by a dean and chapter, not warranted by the stat. 13th of *Eliz.* is not a surrender of a prior lease, it being void:—and yet, according to the doctrine of Lord Coke, 1 *Inst.* 45, a, it is clearly good during the life of the dean. But we do not think this last case from *Rolle's Abr.* an authority for such a position; for although there may be now no question but that such lease would be good during the life of the dean, yet it appears not to have been so understood in the time of Lord *Rolle*, according to the MS. note of Lord *Hale*, cited by the plaintiff's counsel from the notes in Mr. *Hargreave's* edit. of *Co. Litt.* p. 45, note 4, and from the case of *Southwell College* and the Bishop of *Lincoln*, 1 *Mod.* 205; where *Ellis, J.* said that Mr. Justice *Jones*, in the case of *Lloyd and Gregory*, denied *Hunt and Singleton's* case; which is the authority referred to by Lord Coke in support of his opinion given in 1 *Inst.* 45. According to the argument used on behalf of the plaintiff, he is entitled to recover the mesuage in question, because the lease of Mrs. *Egerton* not having been made in compliance with the condition in the leasing power, which requires the best and most improved rent that can be got at the time of making the lease to be reserved, would not operate as an appointment of an interest to the Archbishop under that power; and that, therefore, he took no estate under the will of Lord *Berkeley of Stratton*: and though the lease be void on this account as to the Archbishop, *i. e.* 'as an appointment under the power,' yet, that it is not void *in toto* as to him; for that it passed an interest out of Mrs. *Egerton's* life estate, and operated as to him as a demise for years by a tenant for life, which would pass an interest for so many years as her life should endure. For this

[104]

this last position no authority was cited in the argument but the passage in Lord Coke, of which I have taken notice; where he says, that a lease made by an ecclesiastical person, not according to the provisions of the restraining statutes, is good during his life: but that, it must be remembered, is the case of a lease, which, but for the disabling statutes, would be good for the whole period contained in it, and which could only take effect in one way, namely out of the estate of the lessor: and that the question there did not properly turn on the effect of the instrument, but on the construction of the disabling statutes, *i. e.* whether they made it void *ab initio*, or only void as against the successor; leaving the lease to have the effect and operation it had prior to the statutes for so long time, as it did not prejudice the rights which those statutes were made to protect. But the provisions in Lord Berkeley's will did not contemplate nor had in any manner for their object, the restraint of any faculty or ability to demise, which Mrs. Egerton would have in virtue of her life-estate. One of the first rules for the construction of deeds is, *Verba intentioni, et non e contra, debent inservire*. *Sheph. Touchstone*, 86. And in the case of *Gybson and Searle*, *Cro. Jac.* 176, the rule was recognized in the case of a surrender; where "the Court resolved unanimously that it was not a surrender, for that ought to be the *intent* of the parties;" and it appears that there was not any intent of the parties, but, &c.; and afterwards, "this lease was made with an *intendment* to his *benefit*, and not to his hindrance, as it should be if it should be construed a surrender," &c. And in *Goodtitle v. Bailey*, *Cowp.* 600, Lord Mansfield lays it down, that deeds shall be construed as to "operate according to the *intention* of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the *intention*." And such was the law in the time of Lord Coke as to conveyances by the common law; though the same rule did not hold as to conveyances by the statute of uses; which, in many cases, were not allowed to operate in any way but that in which the party intended they should operate; for it is laid down in 1 *Inst.* 49, "That where a man has two ways to pass lands, and both by the common law, and he *intends* to pass them by one of the ways; yet, *ut res magis valeat*,

1805.
 ROE dem.
 Earl of
 BERKELEY
 against
 Abp. of York

[105]

1805. it shall pass by the other ; but where a man might pass lands
 either by the common law, or by raising a use, in many
 cases it is held otherwise." And even where a conveyance
 might operate in one of two ways under the statute of uses,
 as the *intent* of the parties was considered as working much
 in the raising and direction of uses, it has been holden, That if
 a man *intended* to pass land one way, it should not pass
 another way, contrary to his intent. To this effect is the
 case of *Samon v. Jones*, 2 *Vent.* 318, determined in the
 House of Lords ; and though, as it is said in *Osman v.*
Sheafe, 3 *Lev.* 370, " The Judges have, in later times, had
 more consideration to the substance ; viz. the passing the
 estate according to the *intent* of the parties, than the shadow
 and manner of passing it ;" and where the *intent* of the par-
 ties is apparent to pass a thing one way or another, a deed
 may be good either way, and may enure to divers purposes ;
 and he to whom the deed is made shall have his election
 which way to take it, and may take it that way which is
 most for his advantage,—yet there is no case or authority
 which says, that if a conveyance cannot operate ' in the
 way intended ' to pass the estate intended, that it shall op-
 erate in another way to pass an estate, which was not intend-
 ed, and not within the contemplation of the parties : " And
 though the manner of passing an estate is not to be regard-
 ed ;" yet, " the *intent* is to be regarded, *What estate* is to
 pass, and to whom ?" And so it is laid down by Lord C. J.
Willis in his Report, 687.

[106]

Let us then examine and see what was the *intent* of the
 parties in this case. Was it to take an interest under the
 power only, or to take an interest out of Mrs. *Egerton's* life-
 estate, in case the lease could not operate as an appoint-
 ment under the power ? As to this point, it is impossible to
 doubt. At the time of the new lease the Archbishop had
 55 years, the unexpired remainder of a term of 98 years in
 the messuage in question, an interest of greater value than
 an estate for any single life ; for this interest he could not
 mean to substitute a lease during Mrs. *Egerton's* life only.
 The lease itself also, by its term, shews the *intention* of the
 parties to be only an appointment under the power : for
 Mrs. *Egerton* professes to make the lease ' by virtue of and
 in execution of the power and authority given and reserved

to

to her by Lord *Berkeley* of Stratton.' Thus she in most distinct terms refers the act she was then doing to that power, and does not in the slightest degree shew any intention of granting an interest by way of demise, as owner of the life-estate; for tho'* the lease, after referring to the power, goes on with some words more general, as "any other power," &c.; yet technically speaking, *power* does not apply to the sort of interest which the ownership gives; for which there is the authority of Lord *Thurlow*, in 3 *Bro. Chan. Cas.* 35, if any authority on this head were wanting. The *reddendum* is consistent with the same intent, and proper for a lease made in pursuance of the power; for it makes the rent payable to Mrs. *E.* herself for life, and 'afterwards to those in remainder;' who, had she intended a demise out of her life-estate, would have had no claim to any rent to be reserved under it; and the rent is exclusively reserved to those in remainder, without any alternative provision for payment of an apportioned part of it, in case of Mrs. *Egerton's* death, to which her representatives would be entitled in the event of her dying between two rent days; and which would have been proper, if a demise by her as tenant for life had in any event been intended. From hence it appears unquestionably clear what was her intention,—what the interest she meant to convey,—and what the act she meant to execute. The other party to the deed, the Archbishop, by executing the counterpart, as distinctly shews on his part what he meant to accept, which could be only what by the lease Mrs. *Egerton* meant to grant: his object unquestionably being to come in under Lord *Berkeley's* will, and not under Mrs. *Egerton*, and to acquire an interest which might precede and take place of all the estates subsequent to Mrs. *Egerton's* which were limited by Lord *Berkeley's* will; and were thereby also made subject to the power; and not in any event to let in the interest of the remainder-men on the death of the tenant for life, to his own prejudice, and to the destruction of the interest he had in the premises. If the new lease be a surrender of the old one, it must so operate by construing the Archbishop's acceptance of it to be an assent on his part to take a demise from Mrs. *Egerton* as owner of the estate, contrary to the plain meaning and purport of the deed, to the manifest disadvantage of himself; and this, though he now expressly disclaims, and at no time appears

1805.

ROE dem.
Earl of
BERKELEY
against
Abp. of YORK.
*[107]

[108]

1805. appears to have claimed any interest which Mrs. *Egerton* could give him independent of the power. In Sir *E. Clare's* case, 6 *Coke*, 18, it is laid down, That if a man make a feoffment to the use of such persons as he should appoint by will, and until appointment to the use of himself in fee, and he afterwards devise the land without any reference to his power, he shall be considered "as declaring his intent to devise the land as owner, and not to limit an use according to his authority." So here *vice versa*, as the lease expressly refers to the power, and reserves the rent to the persons in remainder, the parties have declared their intent, that this deed should operate as an appointment, and not as the demise of the tenant for life. In *Hobart*, 159, it is laid down, "That if your act may work two ways, both arising out of your interest, election is given to the patient to use it either way;" on the other hand, "If the act will work two ways, the one by an interest, and the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority:" and lastly, "where interest and authority meet, if the party declare clearly that his will is, That this shall take effect by *his authority or power*, then it shall prevail against interest; for *modus et conventio vincunt legem*." Now, in this case, the parties have declared most clearly and unequivocally, that their will is, that this shall take effect by the authority of power. Whether or not this lease would operate as between the parties to it by estoppel, is not material for the present purpose to inquire; it is sufficient to warrant us in deciding for the defendant, if it did not pass an interest; which, we are of opinion, it did not. As in this case our judgment is formed upon this ground: viz. That Mrs. *Egerton* having a power to appoint, and an estate also which enabled her to demise independent of her power, both parties intended an appointment under the first, and not a grant out of the latter; and that the deed shall not be allowed to operate contrary to such their intention; it will not be necessary to examine the cases of *Wilson* and *Sewell*, and *Davison v. Stanley*, where the lessees could have but one thing in their contemplation; viz. a demise out of the interests which the lessors in those cases either had, or were supposed to have in the premises demised. It may, however, be observed, That the

ROE dem.
Earl of
BERKELEY
against
Abp. of YORK.

[109]

the general reasoning to be found in those cases, applies most strongly to the present. The effect of our opinion will be, That the period of the Earl of *Berkeley* coming into possession of the estate, will not be postponed to any later time than was in the immediate contemplation of the devisor; that the Archbishop will acquire no advantage, and only not suffer a loss by what was probably the mistake of some less cautious or skilful adviser: and this result is what one cannot but feel to be the real justice of the case; and it would have been a circumstance to be regretted, if the law had been found to be otherwise.

1805.

—
ROE dem.
Earl of
BERKELEY
against
Abp. of YORK.

Judgment for the Defendant.

[110]

COLE and Others *against* GOWER and PIGGOTT.

Tuesday,
Jan. 29th.

THE Plaintiffs declared *in assumpsit*, on a promissory note made by the Defendants, dated 8th of *April*, 1803, whereby they promised, two months after date, to pay to the plaintiffs, by the names and additions of Messrs. *Cole*, &c. 'the churchwardens and overseers of the poor' of the parish of *Pulloxhill*, in the county of *Bedford*, or order, 6*l*. The declaration also contained the common money counts. The defendants pleaded *non assumpsit* as to all but 5*l*., and a tender of that sum. At the trial before *Grose*, J. at the last *Bedford* assizes, a verdict was found for the defendants on the plea of tender, and for the plaintiffs on the general issue, with 20*s*. damages; subject to the opinion of the Court, on the following case:—

On the 22d of *January*, 1803, one *Mary Taylor*, single woman, being a pauper of the parish of *Pulloxhill*, swore a bastard child (of which she was then pregnant) to *Gower*, one of the defendants, who was apprehended under a warrant in that behalf on the 7th of *April* following. Shortly after his arrest, and before he had been carried before any magistrate, he offered to compromise the affair with the parish, and to pay the parish officers 20*l*. if they would give him time; and they agreed to take the 20*l*. by instalments, secured by a sufficient person. *Gower* was thereupon released out of custody at his request, that he might find such surety:

The stat. 6 G. 2. c. 31. only authorizes parish-officers to take security from the putative father of a bastard child to indemnify the parish; and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum as the amount of the charge actually sustained by the parish, which tender was found for the defendant, held, That the plaintiffs could not recover further upon the note.

1803.

COLE
a trust
GOWER.

[111]

promising to meet the parish-officers and settle the business next day; and he accordingly met them on the 8th of *April*, together with the other defendant *Piggott*, whom *Gower* offered as his surety; when it was finally agreed, between all the parties, that the 20*l.* should be paid by three instalments, to be secured by three joint promissory notes of the defendants, to bear date respectively the 8th of *April*. The first (whereon the present action is brought) at two months date for 6*l.*; the second at twelve months, for 7*l.*; the third at twenty-four months, for 7*l.* The three notes were accordingly prepared by *Piggott*, who also prepared the memorandum after-mentioned. Before the notes and the memorandum were signed, *Piggott* (in the presence and hearing of *Gower*) asked the parish-officers, Whether they expected that the notes should be paid in case the child died?—who answered, That, without a doubt, it would be expected that the money should be paid in all events. Whereupon the defendants signed the three promissory notes, and delivered them to the plaintiff *Cole*; and he signed the following memorandum, on the part of the parish, and delivered it over to *Gower*; which memorandum, dated 8th *April*, 1803, stated (in substance) That “whereas *Mary Taylor*, of the parish of *Pulloxhill*, &c. single woman, had, by her voluntary examination, taken in writing upon oath, before *E. T.* a magistrate of the county, on the 22d of *January*, 1803, declared herself to be with child, which was likely to be born a bastard, and to be chargeable to the parish of *Pulloxhill*, and had charged *W. Gower* with being the father, &c.: And whereas the said *W. Gower* and *J. Piggott* had given to the parish-officers their joint notes of hand for the payment of 20*l.* by instalments, to indemnify the parish from the costs and charges of maintaining and providing for the child, of which *Mary Taylor* was so enseint; therefore he, *Cole*, one of the churchwardens, &c. on behalf of himself and the rest of the inhabitants of the parish, did thereby undertake and agree to provide for and maintain such child, &c. and to indemnify *W. Gower* from maintaining the same, and all costs, charges, and expences which he might sustain on account thereof.” The first note became due on the 11th of *June*, 1803; and on the 17th, *Mary Taylor*, the pauper, was delivered of a still-born bastard child, in the parish of *Pulloxhill*;

[112]

loxhill: and the defendants being called upon to discharge their first note, tendered 5*l.* in part payment of it; but refused to pay the remaining 20*s.* urging that 5*l.* was the full extent to which the parish had been damnified. The defendants at the trial proved their plea of tender of the 5*l.*; and the plaintiffs did not make out in evidence that the parish had been damnified to above the amount of 5*l.*; but, on the contrary, that they had only expended 3*l.* 1*s.* by reason of the premises. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover?

1805.

 COL^s
 against
 GOWER.

Best, for the plaintiffs, contended, That they were entitled to recover the full amount of the note; and not merely to the extent of the damage actually sustained by the parish. The stat. 18 *Eliz. c. 3.* empowers two magistrates to charge the putative father of a bastard child with the maintenance of it after birth. The stat. 6 *Geo. 2. c. 31.* enables them to commit him before the birth, upon the oath of the mother, unless he give security to indemnify the parish, or enter into recognizance with sufficient surety to appear at the next Sessions, and abide the order there made. In either case, it is compulsory on the father to maintain the child, to whatever amount the expence may be. If the father should be unable at any time to defray the charge, it must fall upon the parish. There is nothing then illegal in the father agreeing with the parish to pay them a certain sum, at all events, in lieu of the indefinite responsibility which he [113] would otherwise lie under, to indemnify them against the charge of maintenance, they taking upon themselves such charge. The compromise is beneficial to both parties:—to the father, because he gets rid of a burden to an indefinite amount, which may exceed what his future ability will enable him to pay, and thereby subject himself to imprisonment; and to the parish, because they secure, at all events, a certain fund for the maintenance of the child, which they might otherwise lose by the future inability or absconding of the father; and the child cannot suffer, as at all events it must be maintained either by the parents or the parish. The statutes do not say that all other methods of providing for a bastard child than those pointed out therein shall be void; nor do they prevent the father from making a contract of this sort with any other for his own benefit and that of his child;

1805.

—
COLE
against
GOWER.

child: and if it were lawful for him to have contracted with any individual for the care and maintenance of the child for a certain sum, there is no reason why he may not make the same contract with the parish-officers. At all events, if the statute of *Geo. 2.* restricted the parish-officers from demanding of the father any further security than what was sufficient to *indemnify* them, the defendants have waived the benefit of it in this instance, by consenting to give the security, after warning that the whole amount of it would be required; and as, if the expence had been more than the 20*l.* the father could not have been made to contribute further, there will be no mutuality in the contract if he be not liable now for the whole.

[114] *Gaselee, contrà.* This contract is void, being against the positive provisions of the legislature, and against public policy. The object of the statute of *Geo. 2.* is not the *punishment* of the father, but the *indemnity* of the parish. The words of it are express to that purpose. The parish-officers then, to whom this note was given in their official capacity, cannot take any other security than that which they are directed and authorized to take by that statute for their indemnity. The note therefore, *ultra* the expence incurred by the parish, is without consideration. There is no mutuality in the contract; for not being conformable to the statute, it would not have bound the parish; but any subsequent, or even the same parish-officers might still have enforced the provisions of the statute against the putative father. He never meant to take the personal undertaking of *Cole*, but of the parish, that he should not be called upon again; and as *Cole* had not the authority he assumed to have to bind the parish, the security taken of the father in exchange for *Cole's* personal undertaking was a fraud upon the former, who could not be considered as a free agent, when he gave it, being in custody at the time. It is true, there are no negative words in this statute prohibiting any other kind of security from being taken, as in the statute requiring sheriffs to take bail-bonds; but the statute of *Geo. 2.* is in effect the same, by giving a new security to the parish, and directing the particular form of it: and in *Wild v. Griffin*, at the Sitings after last *Trinity Term* at *Westminster*, where a similar note was given in absolute terms, Lord *Ellenborough* was of opinion

opinion, That the defendant was only liable to indemnify the parish; and it being proved that they had been indemnified, there was a verdict for the defendant: but further, the taking such a security is against public policy. It is a species of wager upon the life of the child, giving an interest in its death to the parish-officers, upon whom the law devolves the duty of protecting it: and who, in virtue of such contract, take upon them the personal custody of the infant. In *Jones v. Randall* (a) a wager on the event of a suit, which would be good as between indifferent persons, was considered illegal, if made with one who was to sit in judgment upon it, because it gave him an interest in deciding one way.

Best, in reply. It would be attended with great public inconvenience if contracts of this sort, which are in common use throughout the kingdom, were declared to be illegal; for it frequently happens, that parishes have no other method of securing to themselves the indemnity which the legislature intended them, than by taking a certain sum in the first instance: and if such agreements be illegal, the putative father, after payment of the money, will have his action for money had and received, to recover back the consideration whenever the child dies. It is not to be presumed that the parish-officers will neglect the objects of their care in this more than in other instances, or suffer them intentionally to perish for the sake of getting rid of the charge. This was a substantial compliance with the Act of Parliament; and it might as well be said, That in order to legalize the security, it would be necessary first to carry the putative father before a magistrate. The statute does not specify the form in which the security is to be taken. At all events, the undertaking by *Cole*, to indemnify the father, is a good consideration for his note.

Lord ELLENBOROUGH, C. J. I am of opinion, That the plaintiffs are not entitled to recover beyond the sum paid into Court, whether considering the contract as void, upon principles of public policy, or considering it with relation to the individuals with whom it was made, as a contract for gain or loss by persons clothed with a public trust, upon

1805.

 COLE
 against
 GOWER.

[115]

[116]

(a) Cowp. 39.

1805.

COLE
against
GOWER.

the subject-matter of their trust, and giving them an interest in the mal-execution of it. It is a shocking consideration, that, by means of such a security as this, the parish-officers, who have a public duty imposed upon them, to take care that the father shall make a proper provision for the maintenance of the child, acquire an interest that the child should live as short a time as possible. In the case even of a private trustee, the Court of Chancery will not permit him to become a purchaser of an estate which he is entrusted to sell; because it gives him an interest to lessen the purchase-money. Considering the security as given to the parish-officers, only in their individual capacity, it is giving them a temptation to deal with negligence, at least in that most important trust,—the care of children of tender age, which is committed to them: but if made to them in their representative character, and the parish were to receive the benefit of the money when recovered, which was the manifest intention of the parties, it is placing parish-officers in a situation which the legislature did not mean to do, and which public policy forbids. The law did not mean to make this a matter of speculation of loss or gain to the parish: it has said, That the security shall be given to them, in order to *indemnify* the parish. I therefore consider the law as having spoken upon the subject; and it having said, That the security shall be taken for an *indemnity*, it has excluded every other consideration. The parish-officers are not to speculate; but to take the security as a matter of public duty, in the form prescribed by the Act: and taking it in the form they have done, is contrary both to the direct letter and to the general policy of the law.

[117]

GROSE, J. There are two ways of considering this security: the one legal, the other illegal. The legal way of considering it is in conformity to the directions of the Act of Geo. 2. as a note of *indemnity*; and, as such, it would be proper and legal: but in that view of it, the tender made was more than enough to cover the expences incurred. In the other mode of considering it, as a security for a certain sum, payable at all events, it is illegal. The persons to whom it was given are the parish-officers, upon whom a duty is thrown by law, and authority given to them to take security for indemnifying the parish against the charge of main-

maintaining bastard children. They cannot, therefore, convert a power given them, for the mere purpose of indemnity, into a matter of bargain and speculation upon the life and death of the child, thereby making it the interest of the parish to get rid of the child as soon as possible: and though nothing of that sort appear in the case before the Court, yet out of Court such things have been heard of; and it is obvious that they may happen. It is, however, enough to say, That the taking of an absolute security is against the policy of the law, which meant only to secure an indemnity to the parish. Parish-officers ought to pursue the statute; and not to lay a wager in effect on the continuance of the child's life. The practice leads to public inconvenience, and is contrary to their duty. The power given them by the statute may, in this manner, be converted into an engine of oppression, by their enforcing the security taken for the whole sum before the whole expence has been incurred by the parish.

1805.

 COLR
against
 GOWER.

[118]

LAWRENCE, J. I agree with the rest of the Court upon the construction of the statute, though I confess I have had some doubt upon the inexpediency of the practice which has prevailed; for it may often happen, that the putative father may be able to procure friends to enter into security for him to a certain amount, who would not undertake to indemnify the parish to an indefinite extent; and they may thus be left without any other security than the precarious future responsibility of the putative father himself. The statute, however, certainly meant merely to indemnify the parish, and not to create a speculation of loss or profit to them upon the life or death of the child; and the parish-officers should have no temptation to be careless in the execution of their trust: and it must be admitted, that they will not have the same interest to take care of the child, for whose maintenance they have received security for a sum certain, as if it were taken only for their indemnity. Upon the whole, therefore, weighing the inconveniences on either side, it is better to abide by the strict letter of the statute.

LE BLANC, J. I agree with my brothers, upon the ground of public policy. The legislature have marked out to the parish-officers what line they are to pursue in taking the required security, and their duty towards the children. The parish-

1805.

COLE
against
GOWER.

[119]

parish-officers are to call upon the father to give security, for indemnifying the parish against the charge of maintaining the child, whom they are bound to see provided for and taken care of; and the father is to be committed if he do not give such security, or enter into recognizance to appear at the next Quarter Sessions, and abide their order. It is said, That the father might enter into such a contract with any individual; but we must distinguish this from a contract with private individuals: it is a contract with these plaintiffs as parish-officers; and must therefore be construed with reference to the statute, which directs the security to be taken; the object of which was, the indemnity of the parishioners against the burden of maintaining the child. Now that object cannot be attained by taking an absolute security, in the first instance, so well as by taking it as an indemnity; for if the money be received immediately, the benefit is to those persons only who are then living in the parish, while the burden may be thrown on future parishioners; whereas the Act meant that those who were to bear the burden should have the benefit of the indemnity. Besides which, by taking an absolute security, a temptation is holden out to the parish-officers to neglect their duty. On these grounds I agree that the *postea* should be delivered to the defendants.

Postea to the Defendants.

[120]

Tuesday,
Jan. 29th.

DOE, on the Demise of STRICKLAND and Another, against
SPENCE and Another.

Under an agreement by a tenant of a farm "to enter on the tillage land at Candlemas, and on the house and all other the premises at Lady-day following; and that when he left the farm, he should quit the same according to the times of entry as aforesaid;" and the rent was reserved half-yearly at Michaelmas and Lady-day,—held, that a notice to quit, delivered half a year before Lady-day, but less than half a year before Candlemas, was good; the taking being in substance from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candlemas, for the sake of ploughing, &c.

agreed

agreed to become tenants under the trustees for the farm, which was described as being then in their own occupation, "and to enter on the same premises as follows; namely, on the *tillage land* at *Candlemas* last past, and on the *house and all other the premises* at *Lady-day* following; and that whenever they (the defendants) left the said farm, they should quit the same according to the times of entry as aforesaid." The defendants also agreed to pay the rent (11*l.* 19*s.*) half-yearly: at *Michaelmas* and *Lady-day*. The notice to quit was dated and served on the 23d of *August*, 1803, to quit at the end of the year; and a receipt for half a year's rent due at *Old Lady-day*, 1804, was proved to have been taken by the defendants. On this evidence, the defendants' counsel contended for a nonsuit at the trial, before *Chambre, J.* at the last *York* assizes, on the ground that the period between the 23d of *August*, when the notice to quit was served, and either *New* or *Old Candlemas* (a), the time for quitting the *tillage land*, was less than half a year. It was settled however, that the plaintiff should take a verdict, with liberty for the defendants to apply to enter a nonsuit. Such application was accordingly made in *Michaelmas* Term last, and a rule *nisi* obtained; against which

1805.

DOE
against
SPENCE.

[121]

Park and *W. Walton* now shewed cause, and relied upon the case of *Doe d. Dagget v. Snowdon*, (b) as in point; where the tenant having entered on the farm, on an agreement to hold the arable land from *Old Candlemas*, the pasture from *Old Lady-day*, and the meadow from *Old May-day*, the rent being reserved half-yearly at *Old Michaelmas* and *Lady-days*, a notice delivered before *Old Michaelmas* to quit at *Old Lay-day* was holden to be sufficient. It was indeed said in the argument of *Doe v. Calvert*, (c) that the case of *Doe v. Snowdon* had been questioned by Lord *Kenyon*, in an ejectment tried before him at *Stafford*, in 1788, upon the demise of Lord *Grey de Wilton*; but a distinction was noticed by the Court between the two cases cited in giving judgment in the principal case, that it did not appear in Lord *Grey de Wilton's* case whether the notice to quit were given half a year before *Lady-day*, when the rent was

(a) *Old Candlemas* is now the 14th of February. (b) 2 *Blac. Rep.* 1224.

(c) 2 *East*, 382, 4.

payable,

1805.

DOE
against
SPENCE.

[122]

payable, or not, so as to bring it within the rule laid down in *Doe v. Snowdon*. Now here the notice was given above half a year before *Old Lady-day*, though not half a year before *Old Candlemas*. In *Doe v. Snowdon*, the Court said, That the true construction of such an agreement as this was, that it was an holding from *Lady-day* to *Lady-day*, with a licence to the incoming tenant to enter the arable land at *Candlemas*, to prepare it for the *Lent* corn; and that the requiring so early a notice to quit to be given as on the 13th of *August*, would be only giving the tenant an opportunity to injure the land, by taking a second crop of hay from the meadows. And they referred to a case of *Doe d. Earl of Egremont v. Clayton*, at York summer assizes, 1798, where Mr. Justice *Rooke* held, that a notice to quit, given conformably to the rule laid down in *Doe v. Snowdon*, was sufficient.

Cockell, Serjt. in support of the rule. The case of *Doe v. Snowdon*, turned upon the custom of the country, which may be let in as evidence of the holding where no express contract appears; but cannot govern a case like the present, where the parties have committed the precise agreement between them to writing, which must speak for itself. Here there is no ambiguity in the contract; for the tenants were not only to enter on the different parts of the premises at different times, which must therefore constitute a distinct holding of the respective parts from the respective times; but it was expressly stipulated, "That whenever the tenants left the said farm, they should quit the same according to the times of entry as aforesaid." The whole forms one entire contract, and no part can be expunged: neither can it be controlled by any supposed custom of the country in direct opposition to the terms of the contract: in this respect also it is distinguishable from the former case. [Lord *Ellenborough*, C. J. The agreement to quit, according to the times of entry, is no more than what the law would have implied if it had not been so expressed, and therefore cannot differ this case from that of *Doe v. Snowdon*. *Le Blanc*, J. The custom of the country would not make the tenant quit at a different time from that at which he entered.] The custom is not regular or general: it is different in different parts of *Yorkshire*. It is considered merely in the nature of a privilege to enter on the arable before the rest of the farm;

[123]

farm; but here it is stipulated for, and forms part of the contract.

1805.

Doe
against
SPENCE.

LORD ELLENBOROUGH, C. J. The rule of law originally was, that *reasonable* notice to quit should be given where notice was necessary between landlord and tenant. What notice shall be deemed reasonable, has received a construction so long ago as the reign of *Hen. 8th*, in a case in the year books, (a) that it shall be half a year's notice. Then the case of *Doe v. Snowdon* has decided, That the notice to quit shall refer to the substantial day of entry of the tenant, though he may have before entered on the arable land for the benefit of ploughing and preparing it; and, That the incoming tenant may have the privilege of entering upon him for the same purpose, antecedent to the time of the notice; and there is a particular convenience in having it so; for if the landlord were bound to give his notice in *August* upon a *Lady-day* taking, the tenant would be warned of it time enough to enable him to lay up his pasture-ground after the first cutting, and take a second crop of hay, which would be very injurious to it, and which inconvenience will be avoided by the tenant's not having notice till *Michaelmas* of his tenancy being meant to be put an end to. Therefore, on the authority of that case, we may consider that the substantial time of entry by the tenant on the farm was at *Lady-day*, from whence the rent was made payable; with a privilege to the tenant, on the one hand, to enter on the arable land before that period, for the purpose of preparing it; and, on the other hand, a stipulation by him when he quits the farm to allow the same privilege to the incoming tenant. Such appears to have been the general rule of construction laid down with respect to takings of this sort; and being convenient in itself, it is better to abide by it. The particular terms of the agreement at first struck me as raising a distinction between this and the case of *Doe v. Snowdon*; but, upon further consideration, I think they

[124]

(a) 13 Hen. 6. 15. b. 16. This is referred to in the MS. note of Throgmorton on the demise of *Woadby v. Whelpdale*, B. R. Hil. 9 Geo. 3. from whence the short note of that case mentioned in Bull. Ni. Pri. 96, is taken, which does not mention that point. The conclusion of the note of Lord Mansfield's judgment in the MS. is, "13 H. 8. 15 b. half a year's notice so ancient as Henry 8th's time. Lodgings, three months' notice sufficient." And *vide* *Right v. Darby*, 1 Term Rep. 162, 3.

1805. mean in effect the same thing, that the substantial time of entry, with respect to the duration of the tenancy, was at *Lady-day*, from whence the rent was to begin running, and not on the day which is anticipated by the privilege for entering on the arable land.

DOE
against
SPENCE.

GROSE, J. The entering of the incoming tenant on the arable lands at *Candlemas*, is merely for the privilege of ploughing at a time of the year when the land is of no use to the outgoing tenant; that is a known fact: and the case of *Doe v. Snowdon* has put a legal construction upon this sort of agreement; so useful and reasonable that I should be sorry to disturb it, especially after so long an acquiescence, when it has become the known rule of the country: and upon such a subject, it is most important that there should be some fixed reasonable rule to guide landlords and tenants.

[125]

LAWRENCE, J. The rule of law is, that *reasonable* notice to quit shall be given, in order to determine a tenancy from year to year. The question is, What is *reasonable* notice? and that was long ago decided to be half a year with respect to houses and farms; and it has been further considered as a substantial notice for half a year, if given with reference to the time of entry on the house and principal part of the farm; from which time the rent is calculated, though it were agreed that the incoming tenant should enter before on the arable land at a time when the actual tenant of the premises could not be prejudiced by it: from *Candlemas* to *Lady-day* being considered as a time when such land is of no use to the outgoing tenant, but only to the incoming tenant, who is to prepare it for the future crop. Then considering the case as the Court of *C. B.* did in *Doe v. Snowdon*, the agreement is no more than securing a liberty for the incoming tenant to enter on the ploughing land at *Candlemas*, the substantial taking and time of entry of the tenant being from and at *Lady-day*. There is nothing in the terms of the contract about the time for notice to quit to be given; that question arises out of the true construction of the contract taken altogether. I know that in some counties it is stated in the agreement, That the incoming tenant shall have liberty to enter at such a time to plough the land; and, perhaps, that is the more cautious way of wording the contract;

tract; but the terms here used, though not so accurately worded, mean, I think, the same thing.

LE BLANC, J. This case falls directly within the rule of construction laid down in *Doe v. Snowdon*; and if there were conflicting cases, I should abide by that as the most useful in experience, and not contrary to law. According to that case then, the Court will look to the substantial time of the holding; which is from *Lady-day*, the rent being payable at *Michaelmas-day* and *Lady-day*; though for convenience sake the incoming tenant is to enter on the arable land at *Candlemas*. Such land, from *Candlemas* to *Lady-day*, is not in a condition to yield profit to the outgoing tenant; and the only sense of requiring previous notice to be given him to determine his tenancy is, that he may not be injured and deprived of his profits by being turned out on a sudden, or on short notice; but it is no injury to him for the incoming tenant to come in upon the arable lands at *Candlemas*.

Rule discharged.

1805.

DOE
against
SPENCE.

[126]

THE KING against SOUTHERTON, one, &c.

Monday,
Feb. 4th.

THIS was an information filed by the Attorney-General against the Defendant, an attorney of this Court; upon which he was tried and convicted at the last assizes for the

Threatening
by letter, or
otherwise, to
put in motion
a prosecution
by a public

officer to recover penalties for selling Fryar's Balsam without a stamp (which by stat. 42 Geo. 3. c. 56. is prohibited to be vended without a stamped label) for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist; and therefore is not in itself an indictable offence at common law, although it be alleged that the money was obtained; no reference being made to any statute which prohibits such attempt.

But it seems that such an offence is indictable upon the stat. 18 Eliz. c. 5. s. 4. for regulating common informers, which prohibits the taking of money without consent of Court, under colour of process or without process, from any person, upon pretence of any offence against a penal law.

But no indictment for any attempt to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without at least bringing the offence intended within, and laying it to be against, the statute.

Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute, which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for example's sake, might also, upon general principles, have been deemed a sufficient ground to sustain the indictment at common law.

county

1805. county of *Somerset*, upon the fourth and subsequent counts. The fourth count charged, That the defendant, on the 23d of *August*, 1803, wickedly and corruptly intending to abuse the laws made for the protection of his Majesty's revenue, and support of his government, to the oppression of the subject, and to his own corrupt gain, and thereby to bring the same laws into hatred and contempt, "and without any purpose of causing the same to be carried into legal execution" for the good of the realm, sent a letter of that date to *R.* and *W. Allen*, to the tenor and effect following, viz. "Sirs, I (the defendant) am applied to, to prosecute an information against you (the *Allens*) for selling certain medicines without stamps. I have told the parties, That all such informations must now be prosecuted^a by the public officer; and have advised them to let me write you on the subject, and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly; and I will get the best terms I can" (signed by the defendant) with intent to extort and procure money from the said *R.* and *W. Allen*, for the purpose of preventing the said prosecution, in the said letter alleged to be intended against the said *R.* and *W. Allen*, from being commenced, to the great damage, &c. and against the peace, &c.

[127]

[128]

The fifth count (a) charged that the defendant, for his own corrupt advantage, unlawfully, wilfully, and corruptly, did "attempt to extort and procure from *R.* and *W. Allen* 10*l.* "by threatening them that a prosecution should be commenced against them," under and by virtue of the statutes in that case made, for having sold a certain medicine, viz. *Fryar's Balsam*, without a stamp, unless they should pay 10*l.* for the purpose of preventing such prosecution from taking place; with intent to gain corrupt advantage to himself, to the great vexation and oppression of the subject; and thereby to bring the laws for the support and protection of the revenue into hatred and disrepute, &c. and against the peace, &c. The sixth count was for threatening the *Allens* that they should be prosecuted, under the statutes in that case made, for having sold medicines without stamps,

(a) This and the subsequent counts varied from the fourth, in not stating the letter.

with intent to obtain and extort money from them, under pretence of putting a stop to such prosecution, against the peace, &c. There were other similar counts, for threatening other persons in the same manner and with the like intent. The fourteenth count stated, That the defendant, with intent to abuse the revenue laws, &c. (as before) and without any purpose of causing the same to be carried into legal execution for the public good, unlawfully, &c. "threatened *R. Pratchett* with the prosecution of an information against him, for selling certain medicines without stamps," with intent to *extort* money from him, *to induce the defendant to prevent* any such prosecution from being commenced against the said *R. P.* and to procure corrupt gains to himself, to the great oppression, &c. and against the peace, &c. The fifteenth count contained the same allegations as the last; and added further, That the defendant then and there *unlawfully received from R. Pratchett 10l.* for the purpose of preventing such prosecution from being commenced against him, to the great oppression of the subject, &c. and against the peace, &c. None of the counts concluded against the statute.

1805.

The KING
against
SOUTHERTON.

Burrough, in *Michaelmas* Term last, moved to arrest the judgment, observing, That if the indictment were supportable at all, it must be so upon the principle laid down in *Rex v. Scofield*, (a) That an attempt by any act done to commit a misdemeanor, though not completed, is itself a misdemeanor. That the offence imputed in the fourth count of this indictment is the sending a threatening letter, and in the other counts, generally threatening certain persons with a prosecution, to recover penalties for certain supposed offences against a penal law, in order to *extort* money from them for staying the prosecution. But, 1st, Such a threat constitutes no offence at common law, being merely nugatory. 2dly, In order to make such an attempt at *Extortion* (as it is called) an offence, it must at least be shewn to be a threat to prosecute for something which, if done by the party threatened, would be a prosecutable offence by some law; whereas the charge threatened, of prosecuting for selling medicines *without a stamp*, is not a sufficient description

[129]

(a) Cald. 397, 403.

1805. of the offence within the stat. 42. Geo. 3. c. 56. creating the duty, the evasion of which was imputed by the threat; for *sec. 2.* imposes the duty generally, and ascertains the rate of it. *Sec. 7* requires the commissioners of stamps to provide the necessary stamps. *Sec. 10* requires the vendors of such medicines to apply to the commissioners for *paper-covers, wrappers, or labels*, to be affixed to the medicines. *Sec. 11* requires the commissioners to print on the said paper-covers, wrappers, or labels, some mark or words to denote the duties, which shall be delivered to the vendors; and that such covers, wrappers, or labels, shall be fixed on such medicines before they are exposed to sale; and then *sec. 12* gives a penalty of 10*l.* against the vendors of such medicines, *without* having proper covers, wrappers, or labels fixed to them. That therefore is the offence created by the Act. Again: The Act does not require a stamped label for *all* medicines; but for such only as are described in the 19th section, which refers to a schedule at the end of the Act, describing the different medicines by name. The counts then, all but one, which charges a threat of prosecution for selling *Fryar's Balsam* (one of the medicines named in the schedule) are defective, in not shewing that the medicines charged to be sold were such as required stamped labels; and that one count is open to the objection, that the offence is not laid to be against the statute, and to the other general objections mentioned. 3dly, As every person must be presumed to know the law, and as the stat. 43 Geo. 3. c. 73. (which gives a new schedule, and incorporates it with the former Act) prohibits (*s. 4*) any person, except the Attorney General, and the officers authorized by the Commissioners of Stamps to sue for penalties under that Act, the parties threatened must have known that it was not in the power of the defendant, either to have instituted or relinquished any prosecution against them, even if they had been guilty of any offence within the law, which they are not alleged to have been; and therefore that he could not by possibility have executed his threat.

The *Attorney General* was heard against the rule on the last day but one of last Term; but for want of time, the case was ordered to stand over for further argument till this Term.

The Court then expressed great doubt, whether the sort of threat contained in the letter, stated in the 4th count, and stated generally in the other counts, were such as was indictable at common law, being no more than a threat to bring an action of debt, for penalties under a statute, which a firm man might well be presumed to resist. They desired, therefore, that the case might be argued on this general principle: and observed further, That the indictment was not framed on the stat. 18 *Eliz. c. 5. s. 4.* which goes the length of prohibiting, under certain penalties and disabilities, any person, either under colour or pretence of process, or *without process*, upon colour or pretence of any matter of offence against any penal law, from taking any money or reward, or promise of reward, without consent of Court. Nor was it framed on the stat. 30 *Geo. 2. c. 24.* which makes the sending of any letter, threatening to accuse any person of any crime, punishable by law with death, transportation, pillory, or other infamous punishment, with intent to extort or gain money, &c. an offence: and they asked, Whether, before the last-mentioned statute, there were any case in the books of an indictment at common law for such a threat, even where money was obtained, unless where the threat were of personal violence, or calculated to create such fear as might be supposed to operate *in constantem virum*, so as to constitute robbery, or unless the offence were laid in conspiracy. They also noticed, that the several counts alleged, That the threat was made with intent to *extort* money; but that *extortion* meant, properly, the illegal obtaining of money from another, under pretence of right.

The *Attorney General*, *Gibbs*, *Lens*, *Scrjt.* and *Dampier*, shewed cause against the rule in this Term. The indictment is founded on the assumption, that the threatening to put in force a penal statute, not for the purpose of convicting and bringing the offender to justice, and thereby to obtain the penalty for the informer and the Crown, but merely for the party's own private purpose, illicitly to obtain money for *not enforcing* the law, is an indictable offence at common law; being an attempt to procure money by such means as, were the money procured by the means threatened, would clearly be a misdemeanor within the stat. 18 *Eliz. c. 5.* if not also at common law. The 15th count indeed alleges, That the

1805.

The King
against
SOUTHERTON.

[131]

1805. money was actually obtained by the defendant from one
Pratchett, by means of the threat. [Lord *Ellenborough*,
 The KING against SOUTHERTON. C. J. Should you not have prosecuted for that offence
 upon the stat. 18 *Eliz.* which extends to taking money, &c.
 with or without process, under colour or pretence of any of-
 fence against a penal law? The 3d clause of that Act, which
 contains a general prohibition against compounding, applies
 only to *informers* who have commenced prosecutions. The
 4th clause attaches more generally on *any persons* commit-
 ting the offences prohibited, even before they become in-
 formers; and that clause inflicts a specific punishment,
 which must be pursued; but the defendant is not prosecuted
 upon the statute.] It does not follow that these were not of-
 fences before that statute, because it inflicts particular pu-
 nishments on the commission of them not before specifically
 directed to be applied; or if some new offences were thereby
 created, it does not follow, that some of those included were
 not before offences at common law. It might not before have
 been an offence at common law for a common informer to
 have compounded penalties for offences merely regarding
 private rights, though it were always an offence to have com-
 pounded penalties for offences touching the crown or the
 public. The same observation applies to the stat. 30 *Geo.* 2.
c. 24. the introductory part of which seems to consider that
 some at least of the offences therein mentioned were of-
 fences before; for it speaks of "such offenders" before the
 enacting part of the clause: though of that statute it is
 sufficient to say, That it extends the punishment to trans-
 portation. The enacting clause extends generally to the ob-
 taining of money by any false pretence, with intent to
 cheat; and yet, in the case of *The Queen v. Mackarty and*
 [133] *Fordenbrough* (a) such an offence was holden to be indict-
 able before the statute. [Lord *Ellenborough*, C. J. Was
 not that a case of conspiracy? At any rate, the cheat was
 effected by means of bartering pretended port wine, which
 the indictment alleged was *not wholesome* or fit to drink:
 and the vending of such an article for drinking, is clearly
 indictable.] The word *conspired* is not in the indictment.

(a) 2 *Ld. Ray.* 1179, and 3 *Ld. Ray.* 487, and *vide* the observations on this case, 2 *East's P. C.* ch. 18, s. 5. The indictment charged that they *instiged* did the acts complained of.

But the case most in point is *The Queen v. Woodward and Others*, which is shortly reported in 11 *Mod.* 137; but a copy of the indictment having been obtained from the * *Rolls of the Court*, (a) it appears not to have been laid in conspiracy; but only charged that the defendants, intending to defraud one *Smithin* of his money, and having him in their custody, under colour and pretext of a certain warrant alleged by them to have been made by a certain justice of peace against *Smithin* for perjury, threatened to send him to *Newgate*, and have him imprisoned and pillored, unless he would give them a certain sum and his note; which he was obliged to do, in order to regain his liberty. It appears by the *Roll* that the defendants demurred to the indictment: and the report states, that objection was taken that this was no offence indictable; but that was over-ruled. Several objections were then taken to the form of the indictment: 1. That it was not averred that they had no warrant to carry

1805.

The KING
against
SOUTHERTON.
* [134]

(a) The indictment stated, " Quod Marshall Woodward, Jacobus Stone, et Willielmus Jolly, machinantes et intendentes quendam Petrum Smithin de denariis suis illicite et subdole decipere et defraudare, vicesimo tertio die Martii, anno regni domine Annæ, &c. apud parochiam, &c. habentes ipsum Petrum Smithin in custodia ipsorum Marshall, Jacobi, et Willielmi, imprisonment et detentum colore et pretextu cujusdam warranti per ipsos predictos Marshall, Jacobum et Willielmum, tunc et ibidem allegati fuisse facti per Ricardum Lestock, armigerum, tunc unum justiciariorum dictæ domine reginæ, ad pacem, &c. in comitatu Middlesex conservandum assignatum, versus eundem Petrum Smithin pro perjurio, illicite et injuste tales et tantas minas ei imposuerunt de causando ipsum gaolæ domine reginæ de *Newgate* committi, ei in eadem imprisonari, et in et super pilloriam pro perjurio in warranto illo mentionato stare, nisi ipse dictus Petrus Smithin solveret predicto Marshall Woodward summam viginti solidorum, et daret scriptum suum pro solutione summæ quinquaginta solidorum eidem Marshall infra quatuordecim dies tunc proxime sequentes nec non generalem faceret relaxationem eidem Marshall Woodward ita quod idem Petrus Smithin per minas predictas sic ut prefertur ei impositas, et pro obtentione libertatis suæ ad tunc et ibidem illicite coactus fuit dare et solvere dicto Marshall Woodward summam viginti solidorum legalis monete Angliæ, et quoddam scriptum suum pro solutione summæ quinquaginta solidorum eidem Marshall Woodward infra quatuordecim dies tunc proxime sequentes signare, et dicto Marshall ad tunc et ibidem deliberare, nec non quodam scriptum generalis relaxationis ipsius Petri Smithin ad tunc et ibidem ipsi dicto Marshall Woodward facere et sigillare ac eidem Marshall deliberare. Et alia enormia eidem Petro Smithin ad tunc et ibidem intulerunt, ad grave damnum ipsius Petri, in magnam abusionem justitiæ, in contemptum dictæ domine reginæ nunc, legumque suarum, ad malum exemplum omnium aliorum in hujusmodi casu delinquentium, et contra pacem ejusdem domine reginæ coronam et dignitatem suam," &c.

It appears by the records of the Crown Office, that Woodward and Stone demurred to this indictment. The prosecutor joined in demurrer. And in Hilary term, 6 Ann, the Court gave judgment for the Queen, and fined the defendants; Marshall Woodward, 13s. 4d.; Jacobus Stone, 13s. 4d.; and Will. Jolly, 1s.

1805. *Smithin to Newgate* ; nor, 2. That he was not guilty of perjury ; nor, 3. That any money was actually paid : but these objections were also over-ruled by the Court. And by *Holt*, C. J. " Every extortion is an actual trespass ; and an action of trespass will lie against a man for frightening another out of his money. If a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie for." [Lord *Ellenborough*. The party there, it must be observed, was in *custody* at the time.] The indictment was not for false imprisonment or assault ; but the case is an authority, to shew that to use process of law to terrify another out of his money, is an indictable offence at common law ; then it follows, that any act done towards the completion of such an offence, by threatening to use process for such a purpose, must also be an offence upon the principle laid down in *Rex v. Scofield*, (a) and afterwards confirmed in *Rex v. Higgins* (b) that an attempt to commit a misdemeanor by any act done towards its completion, though not effectual for the purpose, is itself a misdemeanor. So where a statute creates a misdemeanor, any attempt by an overt-act to commit such offence, must be itself a misdemeanor at common law ; by the same rule, as where a statute creates a new felony, it draws after it all the incidents of felony at common law, such as accessories before and after, and misprision of felony. Therefore, the 15th count alleging facts which would constitute a misdemeanor under the stat. 18 *Eliz. c. 5.* the attempt to commit such misdemeanor, as laid in the other counts, must necessarily be a misdemeanor at common law. It is not, indeed, enough to make an offence indictable at common law that it is an injury to an individual, unless it also affect the crown or the public. 2 *Hawk. ch. 25. s. 4* ; but that is the case here. The Legislature gave the penalty to the common informer, in order to encourage persons to prosecute with effect those who were guilty of defrauding the revenue of stamp duties ; but if such practices as these could prevail with impunity, the whole policy of the statute would be defeated. The reward would be obtained by the compounder without the consideration which the Legislature intended for the benefit of the pub-

(a) *Cald.* 397—403.(b) 2 *East's Rep.* 5.

lic, in the exposure of the offender, as an example to deter others, and in procuring the king's share of the penalty. The prosecution is thus stifled; for the king cannot sue without knowledge of the offence, which the compounder suppresses. The compounder agrees with the delinquent, That if the latter will give him a certain sum, he will withhold that information from the crown, the giving of which was the sole inducement of the Legislature for giving him any share of the penalty; and, therefore, it is equally an offence in the party so paying the money, or agreeing to give the reward. This is an attempt to render nugatory, or, at least, to lessen the security intended to enforce the collection of the revenue; and is, on that account, indictable. In *Rex v. Bembridge and Powell*, (a) who were indicted for enabling persons to pass their accounts with the pay-office in such a way as to enable them to defraud the government, it was objected: that it was only a private matter of account and not indictable; but the Court held otherwise, as it related to the public revenue. Though even if this could be considered only as a fraud upon an individual, yet, if it were such, against which common prudence could not guard, nor common firmness resist, it would still be indictable. Now, no prudence can guard against a false charge, which the accident of a servant's death might prevent the party from disproving: nor is it any impeachment of a man's firmness that he would rather submit to pay part of the penalty imposed by the Act, than incur the trouble and disgrace of a public prosecution, the issue of which must be at least doubtful. 2dly. As to the particular objections to the frame of the counts, that they do not charge the threat of a prosecution for any offence within the stat. 42 Geo. 3. c. 56. imposing the duty and giving the penalty, it is no objection any more than to say that the party charged is not alleged to have been guilty of the offence imputed. Whether the threat were of an illegal prosecution or of a legal charge against an innocent person, the terror may be the same on the mind of the person accused to induce him to part with his money; and the abuse of public justice is the same.

1805

The KING
against
SOUTHERTON.

[137]

(a) Powell was never tried, but Bembridge was tried at the sittings at Westminster, after Trinity Term, 1803.

1805.

The KING
- against
SOUTHERTON.

[138]

But there is no foundation for the objections, either that the medicines are not mentioned, so as to shew that they were such as required a stamp, or that the threat was to prosecute the party for selling them *without a stamp*, instead of for selling them *without a label stamped by the Commissioners*. As to the first, it is sufficient to state that one of the counts is for a threat to prosecute for selling Fryar's Balsam (one of the medicines enumerated in the schedule, and made part of the Act attaching the duty) without a stamp, against which count the objection would not apply. But even as to the other counts, it is sufficient to state a threat to prosecute for an offence which *might* come within the statute, without setting it forth with the same precision which would be necessary in declaring for the penalty; for otherwise every such offender would escape, by using a threat in general terms, sufficiently intelligible however to the party threatened to produce the effect. [Lawrence, J. It certainly is not necessary that the threat should be conveyed in the words of a special pleader drawing a declaration for a penalty within the Act. It is sufficient if the offender threatened in such a manner as to furnish evidence that he threatened to proceed for a penalty within the Act. The words used would be evidence of the threat of a prosecution for the offence described, which might still be properly described so as to bring it within the statute. The difficulty suggested, therefore, would not occur.] [Lord Ellenborough. The words spoken might be shewn to be a threat of a prosecution for the legal offence described in the Act by introductory matter, and by proper innuendos.] At any rate, the objection is resolved into the threat of prosecuting for the sale of the *Fryar's Balsam without a stamp*, instead of *without a label stamped*, &c. But the selling *without a stamp* is the substantial offence created by the statute, the object of which was to raise a revenue by the stamps on certain medicines; and if there be any distinction between a *label stamp* and any other stamp, the charge of having sold *without ANY stamp*, must necessarily include the former. It is immaterial whether the parties charged were really guilty of the offence or not; for the stat. 18 Eliz. makes no distinction of that sort, and the abuse of the law is still greater if he were innocent; and the attempt to commit the offence, stated in the 15th count, constitutes the misdemeanor at common law. 3dly. As to the objection, That
the

the threat must have been known by the party to be nugatory, by reason of the stat. 43 Geo. 3. c. 73. s. 4. having placed all prosecutions for offences against the Medicine Stamp Law under the control of the Attorney-General and the Commissioners of Stamps; as it is clear that any attempt by sinister means to prevent those officers from prosecuting for such an offence would be a misdemeanor, it follows by the rule first mentioned, that to solicit a reward for preventing them must also be an offence, because it is a step in progress towards the other misdemeanor. It matters not whether he had the means of prevention or not; though it is obvious that the effect might be produced by withholding information himself, or persuading others to withhold it. It is a threat to put the public process in motion by a public officer, if the party will not purchase silence; and, therefore, though legally and strictly speaking, it may not be an attempt to *extort* money, because the defendant himself was no public officer; yet, it was so in substance and effect, because it was to be done by colour of a prosecution instituted by one who was such. In *Serlested's* case, (a) who was indicted for cheating, the indictment charged that one *P.* being a soldier under *H.* his captain, the defendant pretending that he had power to discharge soldiers, took so much from *P.* for his discharge, &c. and one of the exceptions taken was, that it appeared by the statute, That no one but the captain or general could have such a power; and, therefore, the pretence was impossible. But the Court said, That that constituted the deceit. [Lord *Ellenborough*.] The reasoning in that case seems to prove too much; for it goes the length of shewing, That obtaining money under a threat of any thing, however improbable, would be indictable at common law.] So in *R. Tunmer*, (b) error was brought to reverse a judgment on an indictment against an informer for compounding an information preferred by him against a recusant before the Quarter Sessions; and the error assigned was, That the Sessions had no jurisdiction to inquire of recusancy; but the Court said, That it would not lessen the offence if it had been so; but they thought the Sessions had jurisdiction.

Burrough, *contra*, was stopped by the Court.

(a) Latch, 202.

(b) 1 Sid. 311; and 2 Keb. 106.

1805.
The KING
against
SOUTHELTON.

[139]

1805.

The King
against
SOUTHERTON.

Lord ELLENBOROUGH, C. J. To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral action: but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now the threat used by the defendant, at its utmost extent, was no more than that he would charge the party with penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not and ought not to have resisted. I do not say that if the last count had concluded against the statute, it would not have brought the case within the stat. 18 *Eliz.* and the defendant have been exposed to an ignominious punishment. Had the indictment been so framed, it might have been sustained; but it is laid as an offence at common law. The other counts state no more than an attempt by the defendant to charge the several parties with a statutable offence, for which, if guilty, they would have been liable to certain penalties. Then, What authority is there for considering these as offences at common law? The principal case relied on is, That of *The Queen v. Woodward and Others*, which was, where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol upon a charge of perjury, and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats.—

[141] Money obtained in the former cases under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. In the case in *Latch* there were circumstances of deception; though it does not exactly appear by what means the imposition was practised. It might have been a case of cozenage and deceit. Such was the case of *Mackarty* and *Fordenburgh* considered. The wine there given in exchange, was an unwholesome commodity, not fit for man to drink. But this is a case of threatening, and not of deceit: and it must be a threat of such a kind as will

will sustain an indictment at common law ; according to one case, either attended with duress ; or according to others, such as may overcome the ordinary free-will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those ; it is a mere threat to bring an action which a man of ordinary firmness might have resisted.

1805.

The KING
against
SOUTHERTON.

GROSE, J. The case of *The Queen v. Woodward and Others*, was the only one cited that weighed on my mind ; and I have had some difficulty to distinguish it from the present in principle. But what has been said of it by my Lord does, I think, sufficiently distinguish it. This is a mere threat of procuring a penal action to be brought against the party without any circumstance of duress accompanying it ; and therefore this is not an indictment for an attempt to commit a misdemeanor ; for it does not appear to us on this record that any misdemeanor was intended.

LAWRENCE, J. The question is, Whether the offence of which the defendant has been convicted, be cognizable by the laws of this country ? It was argued to be an offence, by insisting that this was an attempt by the defendant to intercept the penalty incurred under the Act of Parliament from coming into the public purse : but, in order to shew that, it must have appeared that the *Allens*, &c. were guilty ; and if that had been shewn, I do not say that this would not have been an indictable offence :—for I agree that there is no difference in the respect contended for between an attempt to commit an offence at common law, and one which is created by statute. They must both be governed by the same considerations. But I think that the indictment is defective in not shewing that the defendant attempted to commit a misdemeanor. This applies as well to the 15th count, which charges the facts therein stated as a common law offence ; for it is not laid to be against the statute. If it had been so laid, it would then have appeared to be an attempt to commit a misdemeanor. The question then is, Whether it be an offence at common law to threaten another that he will procure a public officer to prosecute him, unless he give him money ? It has been decided in many cases, that even where money has been fraudulently obtained, yet it is not indictable ;

[142]

as

1805.
The KING
against
SOUTHERTON.

[143]

as in *R. v. James*, (a) where the defendant obtained money of another by pretending that he was sent by a third person for it. One of the Judges in that case said, That one man cannot be indicted because another has been a fool. The case of *The Queen v. Hannon*, (b) is to the same purpose. It is otherwise where money is obtained by such means as common prudence and firmness cannot guard against. The same distinction was adopted by the old law with respect to such as were deterred by threats from making entries into lands which they claimed. The threats must be such as will deter *virum fortem et constantem*, from entering on the land, in order to render it sufficient for him to go as near to it as he safely may for the purpose of asserting his claim. But there must be a fear of personal violence. *Co. Litt.* 253, b. And it is there said, "That it seemeth that fear of imprisonment is also sufficient, for such a fear sufficeth to avoid a bond or a deed." And that shews the ground of the decision in *The Queen v. Woodward and Others*: that was not a case of mere threat, but the man was in actual duress at the time, and was threatened to be taken to *Newgate*; and one cannot say that that might not be such a threat as a man of ordinary firmness could not resist. (c) But here, when the defendant threatened to prosecute the party for the penalties, a man of ordinary firmness might have well said to him that he was not guilty of the offence charged: and, therefore, he might prosecute him at his peril if he pleased. (d)

Judgment arrested.

Lord ELLENBOROUGH, C. J. then said, That enough appeared to the Court to satisfy them that the defendant was a very improper person to remain as an attorney on the Rolls of the Court. Therefore, he desired the Master to inquire and report, Whether the defendant were still upon the Roll of Attornies of this Court? And the Master having certified to the Court in the affirmative, on a subsequent day, a rule was made on the defendant to shew cause why he should not be struck off; which the defendant yielded to; and his name was accordingly struck off the Roll, his counsel admitting that he could not resist it.

(a) 1 Salk. 379.

(b) 6 Mod. 311.

(c) *Vide* *Rex v. Wood and Knewland*, 2 East's P. C. 732.

(d) *Le Blanc, J.* was absent, from indisposition.

1805.

Moss and Another, Assignees of KIRKPATRICK, a Bankrupt, *Tuesday,*
Survivor of PARR, against MILLS and BOON. *Feb. 5th.*

IN trover, to recover the value of the ship "*Samaritan's Hope*," which was tried at Lancaster Summer Assizes, 1803, a verdict was found for the plaintiffs for 1750*l.* subject to the opinion of the Court, upon the following case:—

Twemlow and *M'Dowal*, residing in *Liverpool*, and owners of the ship in question, then belonging to and lying in the port of *Liverpool*, by bill of sale dated the 6th of *July*, 1799, assigned her for a valuable consideration to *Kirkpatrick*, then also resident in *Liverpool*. In which bill of sale, a certificate of registry *de novo* of the ship, in the names of *Twemlow* and *M'Dowal*, at the port of *Liverpool*, was duly recited. The said recited certificate is No. 135, dated *Liverpool*, 17th (a) of *July*, 1799, and has the following memorandum written upon it: viz. "The former register granted at *Scarborough*, No. 13, dated 3d of *April*, * 1793, having been taken away by the enemy, this vessel is permitted to be registered *de novo*, by order from the Commissioners of his Majesty's customs, No. 379, dated 4th *July*, 1799." The following indorsement also appears upon the said certificate: "*Liverpool*. Be it remembered, that we *T. Twemlow* and *S. M'Dowal*, both of *Liverpool*, &c. merchants, have this day sold and transferred all our right, share, or interest in and to the ship, *The Samaritan's Hope*, mentioned in the within certificate of registry, unto *J. Kirkpatrick* of *Liverpool* aforesaid, merchant. Witness our hands this 29th day

de novo (issued without authority) which recited the cancellation of the former certificate. For the object of the Register Acts in requiring such indorsement, is in order to notify the change of property to the public; and, therefore, it is required to be made on an existing acknowledged certificate in use at the time; and, consequently, no title passed to the assignees of the vendee who had become bankrupt between the time of the original transfer to him and the signing of such indorsement by the vendor; the vendee having also before his bankruptcy conveyed away the ship to third persons for a valuable consideration, who were in possession of it: but quere, Whether any title could be made under such register *de novo*, issued without authority upon a transfer of the ship in the same port? and, therefore, the vendees of the bankrupt only held their possession on such defect of title in the assignees of the bankrupt.

* [145]

(a) *Le Blanc, J.* observed the incongruity of this date: the instrument recited being of a date posterior to the instrument reciting it; but it was answered that such was the fact.

of

1805. of *July, 1799.*" But that indorsement was not signed on the 29th of *July, 1799*, by *Twemlow* and *M'Dowal*, or by Moss and Another, any person authorized by them; nor was such indorsement Assignees, &c. signed by *Twemlow* and *M'Dowal* until the 24th of *June, 1802*, as after-mentioned. On the 29th of *July, 1799*, *Kirkpatrick* had the ship registered at the port of *Liverpool* in his own name, "when the certificate of registry before-mentioned, granted to *Twemlow* and *M'Dowal*, was delivered up and cancelled;" and the same was produced at the trial by a clerk from the proper custody of the Custom-house, *London*; and *Kirkpatrick* obtained the following certificate of registry; viz. "In pursuance of the Act (26 Geo. 3. c. 60) *John Kirkpatrick*, of *Liverpool*, &c. merchant, having taken and subscribed the oath required by this Act, and having sworn that he is sole owner of the ship called *The Samaritan's Hope*, of *Liverpool*, whereof *F. S.* is at present master; and that the said ship was built at *Scarborough*, in the county of *York*, in 1793 (the former register, granted at *Liverpool*, No. 135, dated 17th *July, 1799*, delivered up and cancelled) and *W. S.* tide-surveyor, and *W. Y. jerquer*, having certified to us that the said ship is *British-built* (describing it as required by the Act); and the said subscribing owner having caused sufficient security to be given, as is required by the said Act, the said ship, *Samaritan's Hope*, has been duly registered at the port of *Liverpool*. Given under our hands and seals of office, at the Custom-house, in the said port of *Liverpool*, this 29th of *July, 1799*, *A. Onslow*, collector; *E. Rigby*, comptroller."

Certificate of
registry de
novo.

[146]

Under all or some of the above-mentioned documents, *Kirkpatrick* took possession of the ship, and exercised acts of ownership upon it in respect thereof. In *February, 1800*, *Kirkpatrick*, by a bill of sale, which recited the said certificate of registry granted to *Twemlow* and *M'Dowal*, assigned the ship, for the considerations therein mentioned, to *Young* and *Glennie*, who then resided in *London*; who, in *August 1800*, by bill of sale, assigned the same for a valuable consideration to *Hamilton* and *Touray*, then also residing in *London*; and in *February, 1801*, *Hamilton* and *Touray*, by bill of sale, in consideration of 1800*l.* actually paid by the defendant *Mills*, assigned it to him, then and still resident in *London*; but no indorsement was made on any certificate of registry,

registry, in respect of either the said bill of sale from *Kirkpatrick* to *Young* and *Glennie*, or of that from *Young* and *Glennie* to *Hamilton* and *Touray*, or of that from *Hamilton* and *Touray* to *Mills*; nor was any copy of the said three last mentioned bills of sale delivered, or any other of the requisites of the Register Acts complied with, in respect of the said last mentioned bills of sale. Immediately after the last-mentioned bill of sale, the defendant *Mills* took possession of the ship, and still has it. The bill of sale from *Twemlow* and *M'Dowal* to *Kirkpatrick*, of the 6th of *July*, 1799, is now in the possession of the defendant *Mills*; and has been so since *February*, 1801. In *November*, 1800, *Kirkpatrick* became a bankrupt, and a commission of bankrupt issued against him; and the plaintiffs are his assignees. On the 14th of *August*, 1802, *Kirkpatrick* obtained his certificate. The indorsement made as before-mentioned, on the certificate of registry granted to *Twemlow* and *M'Dowal*, and dated the 29th of *July*, 1799, was signed by them, in presence of two witnesses, upon the 24th of *June*, 1802, and not before. After which day the plaintiffs demanded the ship in question of the defendants; who refused to deliver her up, and converted her to their own use. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If so, the verdict to stand; if not, a nonsuit to be entered; and with liberty to either party to turn this case into a special verdict.

This case was argued in *Michaelmas* Term last, by

Littledale for the plaintiffs. *Kirkpatrick's* title is under the bill of sale of 6th of *July*, 1799; under which he exercised acts of ownership, and the subsequent register *de novo* of the 29th of *July*; and his title is now vested in the plaintiffs, his assignees, unless it has been legally conveyed by him to any other; but though there be three bills of sale, under which the defendants claim, yet none of the requisitions of the Register Acts (a) having been complied with, they can convey no title: but if there were any doubt of the bankrupt's title, under the register *de novo*, on the supposition that it was not authorized by the Register Acts to be granted under the circumstances, yet the plaintiffs have a

1805.

Moss
and Another,
Assignees, &c.
against
MILLS.

[147]

(a) 7 & 8 W. 3. c. 22; 26 Geo. 3. c. 60; and 34 Geo. 3. c. 68.

1805. good title under the prior certificate of registry, which was in fact indorsed to *Kirkpatrick* by *Twemlow* and *M'Dowal*, on the 24th of *June*, 1802, after the time when it bears date; for it was decided * in *Moss* and others, assignees of *Kirkpatrick v. Charnock*, (a) That no time was prescribed by the Register Acts for complying with the requisites of them; but the requisites, when complied with, would relate to the transfer, unless where any other adverse title intervened. [*Le Blanc*, J. Here the indorsement was made upon a cancelled instrument, which differs this from the former case.] It was only cancelled on being delivered up, in order to get a register *de novo*; and, therefore, if the register *de novo* were not regularly granted, the former register was improperly cancelled; and is still the subsisting legal register in point of law. *Beckrow's* case, (b) *Nelthorpe v. Dorrington*, (c) and *Leech v. Leech*. (d) [*Lawrence*, J. There is no doubt that, if an estate vest in a person by deed, the cancelling of the deed, though it may create a difficulty of proving the title, yet cannot divest the estate. Lord *Ellenborough* referred to *Woodward v. Aston*, (e) S. P.] This is stronger than the case of a private instrument, improperly or mistakenly cancelled: it is a public document, required for the benefit of the kingdom; and though the commissioners might tear off the seal, they could not, strictly speaking, cancel it; or if it were once cancelled, the parties have by their subsequent indorsement, set it up again. *Kirkpatrick* had then an incomplete title before his bankruptcy, which was perfected afterwards; and there is no intervening adverse title as to him; for all the parties claim through him.

[149] *Hullock*, *contra*, admitted, That the defendants had no legal title; but contended, that the plaintiffs had none. The register *de novo*, granted to *Kirkpatrick*, was without any authority; and at the time of the indorsement of the prior cancelled certificate of registry to him, he had neither legal nor equitable title to the ship. No title passes by a bill of sale of a ship to the vendee, till the requisites of the Acts are complied with. [*The Court* seemed to take that for granted;

(a) 2 East, 399.

(b) Hetl. 138.

(c) 2 Lev. 113.

(d) 2 Chan. Rep. 100, and *vide ante*, 86, *Roe dem. Earl of Berkeley v. The Archbishop of York*.

(e) 1 Vent. 296.

and also, that no title passed to *Kirkpatrick* by the register *de novo* granted to him.] Then the title could not have relation back to the bill of sale of the 6th of *July*, 1799, by the indorsement on the certificate of the prior register, so long as three years afterwards, viz. in *June*, 1802: No time being fixed by the statutes, within which the requisites must be complied with, the general rule of law applies, that the acts required must be performed within a *reasonable time*; that is, after the return of the ship to port. The policy of the law requires that they should, in order that the public may know who is the real owner of the ship, and that foreigners may not be covertly navigating a *British* ship with *British* privileges. The construction of these Acts, says Lord C. J. *Eyre*, in *Capadose v. Codnor*, (a) which are the bulwarks of the commerce of this country, and the great tower of our naval strength, “must be made on a full consideration of their letter and spirit, taken together. If it were shewn to be essential to a compliance with the spirit of the statutes, that the indorsement should be recited as a part of the certificate, that would go far to establish the necessity of such a recital.” So here the first Register Act, 7 & 8 W. 3. c. 22. s. 21. (which only authorizes a registry *de novo* upon any transfer of property in the ship to *another* port) requires that, upon any alteration of property in the *same* port, “such sale shall be acknowledged by indorsement on the certificate of register, &c. in order to prove that the entire property in such ship remains to some of the subjects of England,” &c. The stat. 26 Geo. 3. c. 60. s. 16. requires various other particulars to be indorsed also on the certificate, for the same purpose; and this is confirmed by stat. 34 Geo. 3. c. 68. s. 15. &c.; which annuls any transfers made without the several requisites being complied with; one of which, required by the 26 Geo. 3. is the *residence* as well as the names of the witnesses to the indorsement: a provision which necessarily points to an immediate compliance, and would be rendered nugatory by being done three years afterwards: and s. 16 of the 34 Geo. 3. expressly provides, That where the vessel shall be at sea, or absent from her port when any alteration in the property is made, so that an indorsement of the cer-

1805.

Moss
and Another,
Assignees, &c.
against
MILLS.

[150]

(a) 1 Bos. & Pull. 465.

1805. tificate cannot be *immediately* made, certain other checks shall be observed; and the indorsement shall be made *within ten days* after the ship's return to port. The same inference arises from the 17th section. At any rate, three years must be too long an interval between the bill of sale and such indorsement. The case of *Moss v. Charnock* only decided, that no time being expressly limited for making the indorsement, it could not avail by relation back to invalidate intervening rights; and that in no event could the property pass out of the bankrupt till the requisites of the Acts were complied with. Whatever time, therefore, had intervened, were it more or less, the decision must have been the same.—

2dly, It was the manifest intention of the Legislature, that the indorsement, whenever made, should be made upon a subsisting operative certificate of registry, in the proper custody where the law requires it to be: but this had been cancelled three years before, and was not in its proper place, or acted upon at the time. An indorsement on such an instrument, having no publicity at the time, would plainly defeat the intention of the Legislature in requiring it. Again: the 15th sect. of the 34 Geo. 3. c. 68. requires a *copy* of the indorsement to be delivered to the person authorized to make registry, without which the sale is declared void: and no such copy was given. [*Littledale, contra*, observed, That the officer of the customs in *London* had the original certificate and indorsement thereon delivered to him when the register *de novo* was granted; and therefore there was no need of a copy.] If the register *de novo* granted to *Kirkpatrick* be void, as is now admitted, things stand in their original situation; and then the officer at *Liverpool*, where the ship's home was, and not the officer in *London*, was the proper person authorized to make registry; and with whom a copy of the indorsement, or at least the original, should have been deposited. The want of such a copy then avoids the transfer of a ship in port, under the 15th section, in like manner as it was holden to avoid the transfer of a ship at sea, under the 16th section, in *Heath v. Hubbard*. (a)

Littledale in reply. As a time is limited by the statutes for certain acts in some cases, and not in others, it must be

taken that a compliance with the latter at any time will be sufficient, except as against conflicting rights intervening. That was the ground of decision in *Moss v. Charnock*. [Lord *Ellenborough*. The indorsement does not state the fact truly; for it states, That the parties have *this day* done certain things, when, in fact, they were not done till three years afterwards; and that too in a case where the form of indorsement given by the stat. 34 G. 3. c. 68. s. 15. requires the parties to state, That they have *this day* sold, &c.; and then requires the date to be added,—seemingly, therefore, requiring that the date and execution should be contemporaneous; and requiring also the then *residence* and occupation of the purchasers, which must apply to the date.] The Legislature relied upon this, That it was for the interest of the purchaser to get his title complete as soon as possible after the sale, to avoid mesne assignments or incumbrances; and till then the property remains in the original owner, to whom the public must look. 2dly, If the Commissioners had no authority to grant a register *de novo*, they had none to cancel the prior one. Their cancellation therefore was a nullity.

The Court then awarded a second argument, which stood for this day; when *Holroyd* was to have argued for the plaintiffs, and *Topping* for the defendants; but

LORD ELLENBOROUGH, C. J. (addressing himself to the plaintiff's counsel) said, Must not the indorsement, at any rate, be made upon an *existing* instrument? Now here it was made upon a cancelled certificate, which was then inoperative. How is it possible to contend against the plain meaning of the statutes, that a legal title can be made through such an indorsement. This objection puts an end to any further question. The Acts, perhaps, have not provided for the difficulty which has occurred; but it is impossible to say, That when the object of the Legislature was to provide for the notoriety of the ownership by every device which could be imagined, an indorsement on an instrument cancelled and abandoned, and no longer in use, should be deemed sufficient. The claim of the plaintiffs is *strictissimi juris*; but if the law had been with them, they must notwithstanding have succeeded: but at least it is incumbent on them to make out their legal right strictly; which cannot be done.

1805.

—
Moss
and Another
Assignees, &c.
against
MILLS.
[152]

[153]

1805.

Moss
and Another
Assignees, &c.
against
MILLS.

GROSE, J. It would not answer the purposes of the Act in requiring such an indorsement on the certificate of registry to indorse a cancelled instrument laid aside : it could not give the publicity required.

LAWRENCE, J. The answer attempted to be given to this objection, on the first argument, was, That the cancellation would not destroy the right and interest of the party if they still existed ; and that may be true : but the force of the objection here is, That the Act of Parliament expressly requires that the transfer of this species of property shall be made only in a particular manner ; and that in this case, an indorsement shall be made on the certificate of registry, which must mean upon an existing instrument acted upon by the parties concerned, and not upon a cancelled instrument laid by ; for, otherwise, how can the publicity of the ownership be secured ?

The plaintiffs' counsel then admitted the force of the objection ; but observed upon the dilemma in which the parties were involved ; for that there seemed no method of making a title to the ship, if a new original certificate could not be granted. To which Lord *Ellenborough* said, That he would not take upon himself to say, Whether such a certificate could or could not be granted : it was enough to say, That the title on which the plaintiffs relied would not avail.

Postea to the Defendants.

Tuesday,
Feb. 5th.

HARRISON *against* PARKER and Another.

A. grants liberty, licence, power, and authority to B. and his heirs, to build a bridge on his land ; and B. covenants to build the bridge for public use, and to repair it, and not to demand toll. The property in the materials of the bridge, when built, and dedicated to the public, still continues in B. subject to the right of passage by the public ; and when severed and taken away by the wrong-doer, he may maintain trespass for the asportation.

IN trespass, the first count of the declaration stated, That the defendants broke down and damaged the battlements, &c. and other erections and buildings of the plaintiff's bridge, situate at *Stockport*, in the county of *Chester* ; and took and carried away the materials, stones, &c. and converted the same to their own use. The second count was for similar trespasses, alleged to be done to a moiety of the bridge. The third was for similar trespasses done to certain walls, &c. of

the

the plaintiff, erected at *Stockport*; but not described as belonging to any bridge. The fourth was for taking and carrying away certain goods and chattels of the plaintiff, and converting them to the defendants' own use. Plea, the general issue. At the trial, at the last assizes at *Chester*, the jury found a verdict for the plaintiff, with 2*l.* 2*s.* damages, subject to the opinion of this Court, upon the following case:—

In the year 1785 the plaintiff, being lord of the manor of *Brimington*, and owner of certain land there, adjoining the river *Goit*, running between and separating the manors of *Brimington* and *Stockport*, and Sir *Geo. Warren* being then lord of the manor of *Stockport*, and owner of certain land in *Stockport*, adjoining the river *Goit*, and opposite to the land of the plaintiff, contracted with Sir *G. Warren* for the liberty of erecting a bridge over the river *Goit*: and accordingly, by indenture of the 12th of *December*, 1785, between Sir *George* and the plaintiff, Sir *George*, in consideration of 1500*l.* granted to the plaintiff the several premises, rights, and privileges set forth in the said indenture after mentioned. The plaintiff also gave a bond, of the same date, to Sir *George*, in the penalty of 5000*l.* conditioned for the performance of the covenants and agreements, &c. in the said indenture. 1500*l.* was accordingly paid by the plaintiff to Sir *George*; and the plaintiff afterwards built the bridge, at his own expence, for 1296*l.* with materials purchased by him; and since that time it has been and is a public bridge, but has never been repaired by the county. In *May*, 1803, the defendants were owners of a house in *Stockport*, at the foot of this bridge; and took down the upper stones of the battlements at the *Stockport* end of the bridge, opposite their house, for the length of ten feet, and carried away the stones, and laid them between their house and the street leading from the bridge, on land not in their possession; from whence, after several days, they were taken away by the defendants, who used them in building a wall. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover? If he were, the verdict to stand; if not, a nonsuit to be entered.

By the indenture of the 12th *December*, 1785, between the plaintiff and Sir *G. Warren*, the latter, in consideration of 1500*l.* granted, confirmed, and assured to the plaintiff and

1805.

HARRISON
against
PARKER.

[155]

1805. his heirs, free *liberty and licence, power and authority, to*
 — build a bridge from a certain close of the plaintiff in *Brin-*
 HARRISON nington, across the river *Goit*, into a certain close of Sir
 against George, in *Stockport*, communicating with a new street, in-
 PARKER. tended to be made in *Stockport* by Sir *George*; and also
 [156] free *liberty and licence, &c.* to the plaintiff, his heirs, &c. to
 lay and build proper foundations, walls, &c. for one end of
 the new bridge upon his, Sir *George's*, said close in *Stock-*
port; and to lay materials upon the said close while it re-
 mained unbuilt upon, for the purpose of building the said
 bridge (the plaintiff making recompence for all damage
 thereby done, &c.) together with the free use and enjoy-
 ment to and for the plaintiff, his heirs, &c. and his and
 their tenants, &c. and all other persons resorting to or from
 the township of *Brinnington* aforesaid, to and from the said
 town of *Stockport*, or elsewhere, of a sufficient carriage road,
 &c. out of and into the market-place in *Stockport*, to and
 from the said new bridge: *habendum* the said *liberties,*
powers, and privileges, granted to the plaintiff and his heirs,
 subject to the covenants, conditions, &c. and agreements
 after mentioned: and the plaintiff covenanted that he, his
 heirs and executors, should, at his and their own expence,
 build the bridge in question, and render it fit for carriages,
 &c. before *September, 1786*; and would, “from time to time,
 when necessary, rebuild, support, and maintain the same in
 repair;” and would also keep in repair a road from the said
 bridge into the public highway in *Brinnington*, and also a
 road on the *Stockport* side of the bridge; “and that such
 bridge, and the roads leading to and from the same,” when
 built and finished as aforesaid, should “for ever remain as
 public highways” for all persons travelling to and from
Stockport, “without being liable to the payment of any toll
 for passing over the same bridge or roads.” Sir *George* also
 covenanted to keep in repair certain new intended streets in
Stockport, communicating with the bridge; and that they
 should be enjoyed as *public highways*: and he also cove-
 nanted that he and all persons lawfully claiming any estate,
 right, title, &c. in and to the said close in *Stockport* (on part
 [157] of which one end of the new intended bridge was to be built)
 or in or to any other the premises, upon, in, or through
 which any of the *liberties, powers, and privileges,* thereby
 granted,

granted, conveyed, and assured, would from time to time thereafter, at the request of the plaintiff, his heirs, &c. do, acknowledge, levy, suffer, and execute all such further lawful acts, conveyances, and assurances, for more effectual granting and assuring the same, by fine, recovery, &c. as should be reasonably advised: and, lastly (after the other covenants and agreements) it was agreed, That the said lands of Sir *George*, on the *Stockport* side of the river, should not be used nor occupied by the plaintiff, his heirs, &c. for any other purpose, except the building the said bridge.

Littledale for the plaintiff. The exclusive property of the bridge is in the plaintiff; and he may maintain trespass against a wrong-doer for any injury done to it, without having an exclusive property in the soil, which it is not necessary to contend passed by the grant,—though the use of the land was meant to be conveyed to the plaintiff and his heirs, for the purpose of the bridge; for the grant excludes any use or occupation for other purposes. If the plaintiff had no property in, or possession of the bridge, he could not comply with the covenant to make it a public bridge, or to keep it in repair; and thus the very object of the grant would be defeated. No *property* in the bridge was conveyed to the inhabitants of the county; but only a mere delegation of the liberty of passage. They are no corporation. The law indeed throws the *onus* of repair of a public bridge upon them, where no other person is chargeable; but that does not give them the *property* of it; and here the county have never in fact repaired it: so public highways are repaired by the parish, though the property in the soil remains in the individual owners, who may maintain trespass for breaking it up. *Lade v. Shepherd*, (a) and *The Mayor, &c. of Northampton v. Ward* (b) are in point. It is no answer to say, That the civil remedy is merged in the public nuisance; for the same objection would have applied to *Lade v. Shepherd*; but the indictment only lies if the right of passage be endangered or impeded; and there is no merger of civil rights in case of misdemeanor, as in case of felony. The party injured may both indict and bring his action of trespass for the same assault. An action cannot indeed be brought by an

1805.

HARRISON
against
PARKER.

[158]

(a) 2 Stra. 1004.

(b) 1b. 1239, and 1 Wils. 107.

1805.
 HARRISON
against
 PARKER.

individual for a public nuisance, affecting him only in the same degree as it affects the public at large; in order to prevent a multiplicity of actions; but that cannot apply to a case like the present, where a man's property is injured. In this case, special damage is not necessary to be shewn,—the law implies a damage from the infringement of the right. At any rate, however, after the stones were severed from the bridge, the exclusive property in them reverted to the builder; after which, there was a distinct trespass and asportation. [Lord *Ellenborough*, C. J. You cannot avail yourself of that in this case; for the jury have only assessed general damages, and not severally on each count. You must, therefore, sustain all the counts; otherwise, the case must go down again for the jury to assess several damages. The fair question, however, meant to be submitted to us is, Whether the plaintiff is entitled to recover at all?]

[159] *Yates, contra.* It is not necessary to enquire, Whether, in consequence of the plaintiff's covenant to repair, he could maintain an action on the case for the special damage done to the bridge? it is sufficient in this case, that no such property passed to him in the bridge as will enable him to maintain trespass. To maintain trespass, either the soil must have passed to the plaintiff, or the exclusive right to the bridge. There is nothing in the grant to pass the soil. It is not a conveyance by lease or release, or other mode of conveyance used to pass land; but it is merely a grant of a *liberty, licence, power, and authority* to erect a bridge upon another man's land; and to lay out and repair a highway leading to it, for the benefit of the public. There is no grant of the soil; and there is even a covenant against laying on a toll for the right of passage over the bridge; so that the plaintiff has not even an incidental interest from the soil: and the covenant for further assurance is merely of that which is granted, and not of that which is not. It was not necessary for the object of the grant, which was merely to secure a right of passage, that the soil should pass. Such a privilege, when granted to the grantee of a private way, does not pass the freehold, nor enable him to maintain trespass for an injury done to the soil; but his only remedy is by action on the case, for any interruption to his way. The plaintiff

1805.

HARRISON
against
PARKER.

[160]

tiff then had no more right to the bridge, after it was dedicated to the public, than any other individual. He had a mere liberty to build it for the benefit of others; and as to the repair, the only remedy against him is upon his covenant; for, by the public use of it, the law throws the *onus* of repair upon the county. (a) No agreement to repair will make a man indictable for non-repair, nor any agreement exempt one who is liable. *R. v. Duchess of Buccleugh* (b) 1 Ventr. 90; and *Rex. v. The Mayor, &c. of Liverpool*. (c) The grantee, or he who has the use of a way, is bound to repair it. *Taylor v. Whitehead*. (d) So is the grantee of a pump. (e) Trespass can only be maintained by one who has the *exclusive* right to the soil, pasture, or other subject-matter injured. *Wilson v. Mackreth* (f) and *Burt v. Moore*. (g) In *Lade v. Shepherd*, and *The Mayor of Northampton v. Ward*, the right of soil was in the respective plaintiffs; and, no doubt, in this case, Sir George Warren might maintain trespass for any injury to the soil. Every thing but the right of passage remains in him. 1 *Roll. Abr.* 392. Any injury done to the battlements (h) of a public bridge, is as much a nuisance as if done to the passage-way: it equally endangers the public passage; and the stat. 12 Geo. 2. c. 29. provides for their repair; and for that which is a common injury, no action lies without special damage, but only an indictment. 9 *Rep.* 113. *Co. Lit.* 56, a. *Cro. Eliz.* 664. [Lord *Ellenborough*. What answer do you give to the count on the *asportavit*, supposing we were with you on the other counts?] The materials pass with the bridge as incident to it, as much as the gravel which is laid on it for repair; so that the plaintiff himself would be indictable for taking down the battlements, after he once dedicated the bridge to the public, and they had accepted and used it; otherwise, after such a dedication, the original owner might interfere with the public repair of it. The property must follow the right; which is either in the owner of the soil, or the public, who have the use of it.

(a) Vide *R. v. The Inhabitants of Wilts*, Salk. 359; and *R. v. The Inhabitants of the W. R. of Yorkshire*, 2 East, 342, 358.

(b) 1 Salk. 358.

(c) 3 East, 86.

(d) Dougl. 748.

(e) 1 Saund. 321.

(f) 3 Burr. 1824.

(g) 5 Term Rep. 329.

(h) Vide 13 Geo. 3. c. 78. s. 52. which gives a penalty for this offence.

Lord

1805.
 ———
 HARRISON
against
 PARKER.

LORD ELLENBOROUGH, C. J. If it were necessary to decide whether trespass were maintainable by the plaintiff for pulling down the bridge, it might be proper to consider whether any property in the soil had passed to him under the grant: but on the fourth count it is not necessary to decide that question. The question is, Whether the original right of the person with whose materials the bridge was originally constructed, and whose property in them was only suspended by the use of them by the public while in the form of a bridge, when those materials cease to be parts of the bridge, whether his exclusive right of property in them do not revert to him? and I am clearly of opinion, that, as against a wrong-doer who has carried them away, the original owner's exclusive right of property does revert to him so as to enable him to maintain this possessory action. They were dedicated by him to the public for given purposes; but a scintilla of property still remained in him; and when those purposes could no longer be answered by their ceasing to be combined in that form, in respect of which the dedication was made, without saying that he could have severed them himself, they returned to him again as his absolute property; and he may well maintain this action against a wrong-doer for the materials now subsisting in the shape of several chattels. It is something analogous to the case where the founder of an eleemosynary foundation dedicates his land to its support, and it afterwards ceases, the land reverts to him or his heirs. Here there was a qualified right of property subsisting in the plaintiff after the dedication of the bridge to the public; which, upon the severance of the materials, became a perfect right of property in him.

[162] GROSE, J. In order to maintain the count on the *asportavit*, it must appear that the stones were the property of the plaintiff, and that they were taken from his possession. Sir George Warren granted to the plaintiff the privilege of building the bridge on his land on the *Stockport* side of the river. The materials were furnished by the plaintiff whose property they were; and he never parted with his property in them to any other; but only gave a right to the public of passing over them in the form of a bridge: he never even affected to give to the public his right to the stones themselves.

selves. Then being his property, they continued in his possession in point of law, just as any chattel would be which was placed by permission on another's ground. If any of the stones had fallen down by accident, that would not give a right to any person to take them, but the property would revert to the plaintiff; the public having had all the use of them which they were intended to have, while forming part of the bridge.

LAWRENCE, J. The only argument which has been urged to shew that this action does not lie is, that the bridge was dedicated by the plaintiff to the public use. But the question is, Whether by such dedication his property in the materials of it passed to them? and for that no authority has been cited. The public had only a licence to make use of the materials while part of the bridge for the purpose of passage; and when they ceased to be part of the bridge, the plaintiff's original property in them reverted to him, discharged of the right of user by the public (a).

Postea to the Plaintiff.

(a) Le Blanc, J. was absent, from indisposition.

1805.

HARRISON
against
PARKER.

STABLE *against* DIXON.

[163]

Tuesday,
Feb. 5th.

THE plaintiff declared in covenant for a year's rent in arrear, upon an indenture of demise, for a messuage and farm, at the annual rent of 18*l.* 10*s.* The defendant, after cravingoyer of the indenture, pleaded, 1st, As to 2*l.* 14*s.* of An order of two justices, founded on the stat. 5 Geo. 1. c. 8. (for providing for the families of absconding men out of their estates) should state how much of the goods or rents of the fugitive should be seized by the parish-officers; and the subsequent order of confirmation by the Sessions should specify the *quantum* of relief to be appropriated out of the goods and rents so seized, and limit a period for such appropriation; supposing such prospective order to be good; and that the order is not to be confined to the discharge of expences already incurred by the parish.

And quære, if the original order be defective in the particular mentioned, whether the Sessions can make it good by an order of confirmation directing the parish-officers "to receive 7*l.* 16*s.* rent of the rents and profits, &c. towards the discharge of the parish for providing for the party's wife," &c.

But at any rate, a payment of one sum of 7*l.* 16*s.* is a sufficient compliance with such order, on the only ground of construction on which it can be supported. And the tenant in whose hands the rent was seized, cannot justify, in covenant by his landlord for rent in arrear, the retaining a second sum of 7*l.* 16*s.* out of the second year's rent, upon the supposition that such order of Sessions extended to enable the parish-officers to receive so much annually out of the rents; for in that view the order would be bad in law upon the face of it, as an indefinite order for the annual payment of such a sum, without any limitation of time, or until further order, &c.

the

1805.

STABLE
against
DIXON.

[164]

the rent, a tender. 2dly, As to 15*l.* 16*s.*, the residue, payment thereof to the plaintiff's use. 3dly, A set-off for 20*l.* paid by the defendant to the use of the plaintiff, at his request; and for so much more had and received by the plaintiff for the defendant's use; and for the like sum for meat, drink, &c.; and other necessaries provided by the defendant for the plaintiff's wife, and other persons at his request; and also upon an account stated. 4thly, The defendant pleaded as to 7*l.* 16*s.* parcel of the said sum of 15*l.* 16*s.* and of the rent declared for: that before the 25th of *March* 1803 (when the rent became due) the plaintiff had gone away from his place of abode at *Corney*, in the parish of *Corney*, in the county of *Cumberland*, into some other county or place, and had left *D.^o S.* his wife in the said parish, chargeable thereto, the place of their then legal settlement; and that the plaintiff continued so away from his said place of abode till after the 25th of *March*; viz. from 24th of *June*, 1801, hitherto; during which time, his said wife continued so chargeable to the parish; and it thereupon became necessary that she should be maintained at the expence of the said parish: whereupon the then overseers of the said parish afterwards, in pursuance of the statute in that case made, applied to *J. K.* and *J. B.* two justices of the peace for the said county of *C.* where the plaintiff's wife was so left as aforesaid: and thereupon, the said justices in pursuance of the statute, made their warrant or order in writing, under their seals, directed to the churchwardens and overseers of the poor of the said parish of *Corney*; whereby, after reciting (in substance) That it appeared to them, the said justices, as well on the complaint, &c. as on due proof on oath, that the plaintiff had gone away from his place of abode at *Corney*, &c. into some other county or place, and had left *D. S.* his wife, chargeable to the said parish, the place of their last legal settlement; and that the plaintiff had some estate whereby to ease the said parish of the said charge, in whole or in part; they, the said justices, thereby authorized and commanded them, the churchwardens and overseers, &c. of *Corney*, 'To receive the annual rents and profits of the lands and tenements' of the plaintiff at *Broomhill*, in the parishes of *B.* and *W.* in the said county of *Cumberland* (the same being the said lands

and

and tenements demised to the defendant) ‘for and towards the discharge of the said parish of *Corney*, for the providing for the plaintiff’s wife:’ and that with the said warrant, they, the said churchwardens and overseers, should appear at the next Quarter Sessions for the county, and certify then and there what they should have done in execution of the said warrant. The plea then stated, that at such next Quarter Sessions, holden on 13th of *July*, 1801, the said order was, in pursuance of the statute, *confirmed* by the Court; ‘and the Court did then and there order the said churchwardens and overseers, &c. to receive 7*l.* 16*s.* rent of the rents and profits of the lands and tenements of the plaintiff at’ *B.* in the parishes of *B.* and *W.* &c. being the premises so demised to the defendant, for and towards the discharge of the said parish of *Corney* for the providing for the said *D. S.* the plaintiff’s wife; and then the plea alleged payment of the said 7*l.* 16*s.* parcel of the rent, by the defendant, by virtue of such order. The replication, after accepting the tender of the 2*l.* 14*s.* paid into Court, and traversing the payment of the 15*l.* 16*s.* residue, as stated in the 2d plea, and the sums alleged to be due by way of set-off in the 3d plea, pleaded as to the said sum of 7*l.* 16*s.* in the 4th plea mentioned; that before the said 25th of *March*, 1803; viz. on 1st of *October*, 1801, ‘the said 7*l.* 16*s.* in the said order of Sessions mentioned, was paid by the defendant’ to the then churchwardens and overseers, &c. of *Corney*, ‘pursuant to the said order of Sessions;’ and that afterwards, on the 25th of *March*, 1802, ‘the said 7*l.* 16*s.* was deducted by the defendant, and allowed to him by the plaintiff out of the rent,’ &c. which on the day and year last aforesaid became due from the defendant to the plaintiff, and thereby and thereout was paid and satisfied to the defendant. Rejoinder to the last replication; that the sum of 7*l.* 16*s.* mentioned in the 4th plea to have been so paid by the defendant, was ‘another and different sum of 7*l.* 16*s.* than the 7*l.* 16*s.* so deducted and allowed as aforesaid; namely, for the second year’s payment under the said order’ in the said plea mentioned; which said last mentioned sum has not been deducted, or allowed, or paid by the plaintiff. To this there was a general demurrer, and joinder.

1805.

STABLE
against
DIXON.

[165]

1805.

STABLE
against
DIXON.

Holroyd in support of the demurrer contended, upon the construction of the stat. 5 Geo. 1. c. 8. s. 1. 1st, That the original order was void. 2dly, That the Sessions had no original jurisdiction; and, consequently, nothing done by them upon a void order could make it good. 3dly, That if the order of Sessions, correcting and limiting as it did the order of the justices, were good, it had been complied with by the plaintiff. 1st, The statute enables the officers of the parish where any wife or child shall be left a charge upon them by the husband or father going away, "Upon application to, and by warrant or order from any two justices of the peace, to take and seize *so much* of the goods and chattels, and receive *so much* of the annual rents and profits of the lands and tenements of such husband, father, &c. as such two justices shall order or direct, for or towards the discharge of the parish where such wife, child, &c. are left, for the bringing up and providing for such wife, &c.; *which warrant or order being confirmed* at the next Quarter Sessions, it shall be lawful for the justices of such Quarter Sessions to make an order for the overseers, &c. to dispose of such goods and chattels by sale or otherwise, or so much of them for the purposes aforesaid as the Court shall think fit; and to receive the *rents* and profits, *or so much of them*, as shall be ordered by the Sessions as aforesaid, of his lands, &c. for the purposes aforesaid." The original order then is void, either as being prospective to seize the rents and profits for future expences to be incurred, and not confined to the *discharge* of expences already incurred; or admitting it might be *prospective*, in not having ascertained the *quantum* of relief required by the parish; for the parish-officers are only to receive *so much* of the rents, &c. as two justices shall order, &c. Supposing that the statute meant that the order should be prospective, the justices should have found what was reasonable for the maintenance of the family; and have adjudged that particular sum to be continued to be received and applied during the exigency: but it was never intended to authorize an indefinite seizure of a man's rents and profits generally, and to make the parish-officers trustees for the surplus. There is no authority given by the statute to the justices to discharge such an order when once made; and, therefore

[167]

therefore it ought at least to be limited, in the terms of it, to the necessity which occasioned it. In *R. v. Chaffey*, (a) an order of justices made upon the 13 and 14 Car. 2. c. 12. for seizing the defendant's goods to secure the parish from the maintenance of his bastard child, was quashed, because the justices had not ascertained the *quantum*. 2dly, If the original order were bad, the Sessions could not make it good. They cannot originate an order of this sort; they have only power given them to confirm it, and direct a sale of the goods; though it seems that they may vary the sum before directed to be levied. But 3dly, If the Sessions could remedy any defect in the original order by ascertaining the sum to be raised, they have fixed the sum at 7*l.* 16*s.* and that sum is admitted on the pleadings to have been once before paid and deducted out of the rent. The order, therefore, is *functus officio*; for it does not state that the same sum shall be raised *annually*, even if that could have been supported.

Wigley, contrà. The order in question follows the precedent in *Burn's Justice*, which being in general use, the Court will incline to support it, if possible. The statute meant that property to any extent which a man had, who deserted his home and left his family a charge on the parish, should be taken and applied to their relief. If the whole were necessary to be taken, the justices in whose discretion the *quantum* was left, might direct the whole to be taken, or only a part of it. Here they have adjudged that the whole should be taken "towards the discharge of the parish for providing for the plaintiff's wife." The order was afterwards *confirmed* as the statute requires by the Sessions, who directed that 7*l.* 16*s.* *rent of the rents and profits* of the plaintiff's lands at *B.* should be received by the parish officers: that, though not formally expressed, must mean so much of the annual rents; for the order, which was to seize the whole, is also confirmed generally, and it must all be taken together. It is necessary that the order should be to seize generally, otherwise it would only apply to by-gone rents, which the tenant might pay over before any order could be obtained. The seizure is only that the rents may be forthcoming to answer the purpose; for till con-

1805.

STABLE
against
DIXON.

[168]

(a) 2 Ld. Ray. 858.

1805.
 ———
 STABLE
 against
 DIXON.

[169]

firmation at the Sessions, nothing can be applied in aid of the parish. If the order of confirmation had meant to confine the parish-officers to receive only one sum of 7*l.* 16*s.* out of the rents then seized, it would have said so. The order is not more general than the statute itself, which directs the parish-officers to take and seize so much of the *annual* rents and profits as the justice shall direct; which shews that it was meant to operate prospectively; and that appears also from the application directed of the property taken to the *bringing up* and providing for the wife and children: and there is the less reason for narrowing this construction which has hitherto prevailed, because the party may at any time apply to the Sessions for a discharge of the order, on returning to his family and paying up his arrears. In *Jenkins's* case (a) an order of Sessions that the defendant should pay 2*s.* a week towards the support of his father, till that Court should order the contrary, was holden good; because a time was limited; and if an estate happened to fall to the father before, the defendant might apply to the justices. The case of *R. v. Pemoyr*, (b) where an order for relief appointing the defendant to pay 2*s.* 6*d.* a week, without any limitation of time, was quashed, may seem contrary; but no cause was shewn. Besides, the replication, so far from demurring to the order stated in the plea, as bad in law, admits that the first payment under it was good, and objects only to any further payment; and as long as that order stands unreversed by this Court, unless it be totally void on the face of it, it is sufficient, being made by a Court of competent jurisdiction, to justify the tenant, who has acted under it. In *Chaffey's* case, the order was to seize what the overseers thought proper; which was contrary to the words of the Act, leaving it in the discretion of the justices themselves.

[170]

Lord ELLENBOROUGH, C. J. The stat. 5 *Geo.* 1. was made to prevent a great public inconvenience arising from persons going out of their parishes, and leaving their families a burden to the parishioners, although they had substance of their own out of which they might be maintained: and it gave to two magistrates a power of appropriating to this purpose *so much* of the goods and chattels, and *so much* of

(a) 2 Salk. 534.

(b) 1 Const. 316.

1805.

 STABLE
 against
 DIXON.

the annual rents and profits of the party as they should order and direct: or as the Sessions afterwards, to whose confirmation such order is to be submitted, should think fit. But it never was meant to invest the parish-officers or the magistrates with a right to take indefinitely all the property of such a person, without apportioning how much of it was to be taken for that purpose. The language of the Act is, That the goods and chattels, and rents and profits, are to be taken for or towards *the discharge* of the parish; which imports that it was to relieve the parish from a burthen already incurred; and which was, therefore, capable of being then ascertained. But even if their power extend to the making a prospective order for future maintenance likely to be incurred, at all events the justices are to ascertain *how much* is to be taken; for the Act expressly says, That the parish-officers shall take *so much*, &c. as the justices shall order. That makes it imperative on the magistrates to ascertain the sum; but if an order like this could be sustained, it would open a door to great vexation. If any person happened to go away, leaving his family a charge on the parish, it would authorize the justices to make the parish-officers trustees for the whole of his property to whatever amount. The original warrant then being made in the exercise of an indefinite, instead of a limited authority; and being void in that respect, the next question is, Whether it were capable of receiving confirmation at the Sessions? And assuming that it could, as capable of limitation in respect of the sum to be taken by the parish-officers (for they seem there to have abandoned the ground of an indefinite seizure) then, Can the order of Sessions be sustained beyond the terms of it, as an order to receive the sum of 7*l.* 16*s.*? Admitting that it might be good to that extent as an order to receive a definite sum (subject, however, to the objection to it as a confirmation of an original indefinite order of seizure) the answer is, That the sum is already paid and allowed. But taking it, as is now contended for, as an order to receive that sum annually out of the rents and profits without any limitation of time, the objection applies that for want of such limitation, "as till some other order made," it is void by the authority of the case mentioned.

[171]

1805.
 ———
 STABLE
against
 DIXON.

mentioned. Therefore, unless the order of Sessions be understood as limited to raise 7*l.* 16*s.* once for all, that would also be invincibly bad; and if so understood, the order has been satisfied.

GROSE, J. The question is, Whether the order of Sessions for the payment of the sum specified has not been obeyed? The plaintiff alleges that he has paid the 7*l.* 16*s.* once; which the defendant does not deny; but now insists that the order of Sessions authorizes the annual payment of that sum for ever. If it do, such an order cannot be sustained for a moment; for the statute only authorizes the churchwardens and overseers to take *so much* as the justices shall direct; that is, so much as the parish shall have sustained. The Sessions, however, have specified a particular sum to be paid. It is plain, therefore, that they thought the sum necessary to be specified; though it is now pleaded as a continuing order, which is to last indefinitely. Taking it to be so, the first order is bad, because, no sum is therein specified; and the second order is bad, because made for an unlimited time. The intention of the Legislature in making this provision, was only to indemnify the parish; and it meant either that the money ordered to be taken should have been expended by the parish, or that the justices should judge what was proper to be expended upon the family of the absconding man. But as the matter stands, I cannot say that the justification pleaded is good in law.

[172]

LAWRENCE, J. The first order of the justices ought to have specified the sum to be raised; because the declared intention of the Act is, That *so much* should be taken as the justices should think fit, meaning that they should exercise their discretion upon the amount to be taken. That order should have specified how much property was to be seized; and then the order of Sessions should have stated how much of that should be sold or appropriated. I cannot consider the order of Sessions as directing that more than one sum of 7*l.* 16*s.* should be taken. If more had been intended, they should have said so more distinctly, as by adding the word *annually*, or *till further order*. The defendant, therefore, has no reason to complain of having been misled by the order,

order. Besides, if the order were illegal, he should have refused payment; and if indicted for disobedience, he might have defended himself; or he might have brought an action of trespass if his goods had been distrained; for he would not have been concluded by an order to which he was no party, from shewing that it was illegal; but I think the order of Sessions only meant that one sum of 7*l.* 16*s.* should be taken. (a)

1805.

STABLE
against
DIXON.

Judgment for the plaintiff.

(a) Le Blanc, J. was absent, from indisposition.

[173]

DOE on the Demise of JOHN GILL and HANNAH his Wife
against PEARSON and Others.

Wednesday,
Feb. 6th.

IN ejectment for the moiety of an estate in the parish of *Ackworth*, in the county of *York*, brought upon the demise of *John Gill* and *Hannah* his wife, stated in the declaration to have been made on 19th *January*, 1787, 44 G. 3. a verdict was found for the plaintiff at the last assizes at *York* before *Chambre, J.* subject to the opinion of this Court, upon the following case:—

John Collet being seized in fee of the estate in question, by will dated 13th of *January*, 1787, and duly executed,—first directed that all his debts, legacies, annuities, and funeral expences should be paid by his executrices out of his real and personal estates, which he charged therewith; and then reciting that he had given a bond for 300*l.* to his son-in-law *R. Cuttle* on his marriage with his daughter *Marga-*

One having real & personal estates gave by his will several legacies and annuities, which he directed to be paid by his executrices out of his real and personal estates, which he charged therewith: & then devised certain lands in Y. to A. and H. (two out of five daughters which he had) & their heirs, as tenants in common, on

condition, that in case they or either of them should have no issue, they or she having no issue should have no power to dispose of her share except to her sister or sisters, or their children: and he devised all the rest and residue of his real and personal estates to A. and H. in fee; whom he made his executrices. On his death, A. and H. entered; and afterwards A. levied a fine of her moiety to the use of her husband in fee, and died. Held, That the condition against alienation, except to sisters or their children, annexed to the devise to A. and H. and their heirs was good; and that for the breach of it by A. in levying such fine, the heirs of the deviser might enter on her moiety; it being a remainder undisposed of by the residuary clause, which was only intended to operate upon such things of which no disposition had been made by the will, and not contemplating the devise over of the respective moieties of the daughters on non-performance of the condition. And held, That one of the several co-heirs of the deviser might enter for non-performance or breach of the condition, and recover her own share in ejectment. For that where the entry upon a claim by one of several co-parceners, who make but one heir, is lawful, such entry made generally, will vest the seisin in all as the entry of all.

1805. *ret* as a marriage portion; he, therefore, only gave to the said *R. and M. Cuttle*, 1s. (besides the sum due on the bond) in full of all claim upon his estates or effects. He then bequeathed to his daughter *Mary*, the wife of *D. Unwin*, an annuity of 8*l.* for her life, to be paid to her (for her separate use) by his executrixes, by her quarterly payments (with a power of distress for arrears.) He also bequeathed to *D. Unwin* 1s. in full of any claim on his estate or effects. He then bequeathed to the children of his said daughter *Mary Unwin*; viz. *Thomas, Fanny, George, William*, and *Mary Unwin*, 10*l.* each; to be paid to them as they respectively attained their age of twenty-one years, and after their mother's death;—and he willed, That if any of the children of his said daughter *Mary* happened to die before he, she, or they attained the age of twenty-one years, without having lawful issue, then the share of either so dying should go to the survivors. He also bequeathed to another daughter, *Fanny*, the wife of *James Brinon*, an annuity of 9*l.* for life; to be paid to her by his executrixes by half-yearly payments (for her separate use, and with a power of distress for arrears;) and he gave the said *James Brinon* 1s. in full, for any claim out of his estates or effects. He also bequeathed legacies of 20*l.* to each of the children of his daughter *Fanny*, in the same manner as he had before done to the children of his daughter *Mary Unwin*; and directed all the legacies given to his grandchildren to be paid as they severally became due to them by his executrixes. He then devised as follows: “ I give and devise unto my two daughters *Ann Collett* and *Hannah Collett* all my messuages, lands, tenements, and hereditaments at *Ackworth*, or elsewhere, in the county of *York* (subject to the several legacies and annuities hereinbefore given by this my will, and made chargeable thereon) to hold to them my said daughters *Ann* and *Hannah*, their heirs and assigns for ever, as tenants in common, and not as joint tenants, upon this specific proviso and condition, That in case my said daughters *Ann* and *Hannah Collett*, or either of them, shall have no lawful issue, that then, and in such case, they or she having no lawful issue as aforesaid, shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children. All the rest, residue

DOE d. GILL
and Wife
against
PEARSON.

[174]

[175]

due and remainder of my real and personal estates, goods, chattels, and effects, not hereinbefore disposed of, I give, devise, and bequeath unto my said two daughters *Ann Collett* and *Hannah Collett*, their heirs, executors and administrators, and do constitute them joint executrixes," &c. The testator *John Collett*, shortly after making his will, died, seised in fee of the estate in question, leaving no son, but five daughters; *Mary*, then the wife of *D. Unwin*, since deceased; *Ann*, afterwards the wife of the defendant *James Wait*, also since deceased; *Frances*, then the wife of *James Brinon*, also since deceased; *Margaret*, then the wife of *Richard Cuttle*, now living; and *Hannah*, afterwards the wife of the lessor of the plaintiff *J. Gill*, also now living. *Ann*, the wife of *J. Wait*, never had any issue; but all the other four daughters have had issue which are now alive. Upon the death of the testator, his daughters *Ann* and *Hannah* entered upon his real estates. Soon after, *Hannah* married *John Gill*, the lessor of the plaintiff; and *Ann* married the defendant *J. Wait*. The defendant *Wait* has for some years enjoyed one moiety of the estate in right of *Ann* his wife, and rented the other moiety of the plaintiff *John Gill*, and *Hannah* his wife, as tenant from year to year. The other defendants are tenants to *Wait*. *Wait* and *Ann* his wife, being in possession of the estate in 1779, duly levied a fine *sur connoissance de droit come ceo*, &c. of a moiety thereof; and by indenture duly declared the uses thereof to be to the use of the defendant *Pearson* and his heirs, in trust for *J. Wait* in fee. *Ann Wait* died above a year ago, without having disposed of her share in the said estate, otherwise than by the said fine and indenture; and never having had any issue. Since her death and before the day of the demise laid in the declaration, *J. Gill*, and *Hannah*, his wife, duly made an entry to avoid the said fine. The question for the opinion of the Court was, Whether the lessors were entitled to all or any part of the moiety of the said estate devised to *Ann Wait*?

1805.

DOE d. GILL
and Wife
against
PEARSON.

[176]

The case was argued last *Michaelmas* Term.

Wood, for the lessors of the plaintiff, contended, first, That they were entitled to the other moiety in right of *Hannah*. By the proviso, the testator's daughter *Ann* having had no lawful issue, was restrained from alienating her

1805. moiety any otherwise than to one or more of her sisters, or their children: and this restraint of alienation being only partial, is good, not being repugnant to the estate in fee before given to her. *Co. Lit.* 223, 4. s. 361. That indeed speaks only of a feoffment in fee, on condition not to enfeoff a particular person or his heirs; but the reason given is co-extensive with this case; because the condition doth not take away all power of alienation from the feoffee. Besides which, the restraint does not attach at all, except in the event of the devisee not having any issue. Either then the alienation made by *Ann*, in her lifetime, was a forfeiture of her moiety of the estate, which she held as tenant in common; in which case, the lessor of the plaintiff *Hannah*, having survived her sister, would be entitled to the whole under the residuary clause, which carried all that was undisposed of to them as joint tenants in fee; or if the residuary clause do not extend to the moiety, at least *Hannah* would be entitled to recover one-fourth of it, as heir at law of *Ann Wait*, in conjunction with her three other sisters or their respective issue.

[177] *Lambe contra*, admitting, That there may be a partial restraint of alienation annexed to a devise in fee, contended still, That the restraint here imposed was inconsistent with the estate given; for the legacies, annuities, and funeral expences, are a charge upon the devisees *Ann* and *Hannah*, in respect of the real as well as personal estate given to them; and therefore to enable them to discharge those incumbrances, it is necessary, by a current of authorities, (a) that they should take an unqualified fee, otherwise the estate may not be co-extensive with the charges. The condition then, being repugnant to the estate before given, saddled with those charges, is void, according to *Co. Lit.* 223. s. 360: but, [at any rate, the defendants are entitled under the indenture and fine; for the estate is given to the two sisters *Ann* and *Hannah* as tenants in common, and not as joint tenants; and by reason of the latter words, "having no lawful issue," which may be construed to restrain the general limitation to them, and *their heirs*, to mean *heirs of the body*, either the two sisters would take an estate tail, which, as far

(a) Vide *Doe d. Stevens and Pain v. Snelling*, ante 87,—the last case determined on this point, where there are references to antecedent cases,

as regards *Ann's* moiety, is now spent; or they would take their respective moieties in fee, upon condition of having issue. In either way of construing the will, there is no pretence to say, That a forfeiture has been incurred; for admitting that *Ann* took only an estate tail in common with her sister, yet they would take the remainder in fee, as joint tenants, under the residuary clause, and the fine which will pass future as well as present interests, being only levied of her moiety, to which she was clearly entitled, would attach not only upon her estate tail, which she held in common, but also upon her joint reversion, of which it would sever the jointure; and then the declaration of uses would give it to the husband of *Ann*, under whom the defendants claim. [Lawrence, J. May it not be considered, that the two sisters are joint tenants of each moiety of the remainder, under the residuary clause; and if so, taking the fine to operate upon *Ann's* moiety, under the residuary clause, would not the effect of it be to sever the jointure in that moiety only, of which each was joint tenant?] Being joint tenants of the whole, the fine would operate to sever the jointure of the whole, and attach upon the entire moiety: but supposing the fine and indenture to have no effect, and that this was an interest undisposed of, descending to the heirs at law, the sisters of *Ann* could only take as parceners. Then they must all dissent; for none but the heir can take advantage of a condition broken,—the grantee of part of a reversion, which is this case, shall not take advantage of it; (a) and all the parceners, including the descendants of the sisters, who are dead, make but one heir. Therefore, they should either have all joined in this ejectment, which would have shewn their dissent; or at least it should have been stated as a fact in the case that all the others dissented, as well as the parcener, by whom the ejectment is brought.

LAWRENCE, J. There is no such point reserved in the case. For aught we know, it might have been proved at the trial that they all dissented, if any question had been made of it: but referring to the case of *Muschamp v. Bluet*, (b) he observed, That however a condition not to alien to such an one by name might be annexed to a devise in fee, it was

1805.

DOE d. GILL
and Wife
against
PEARSON.

[178]

[179]

(a) Co. Lit. 214, b. 215, a. s. 347.

(b) Bridgm. Rep. 137.

1805.

DOE d. GILL
and Wife
against
PEARSON.

not equally clear, that a condition, like the present, restraining alienation generally, except to certain persons, was good. In that case it was holden otherwise.

Wood, in reply, said, That he was not aware of that case; but contended, That such a condition would be equally good within the principle laid down in *Co. Lit.* in the passage before cited. As to the other objections, the legacies and annuities are charged *on the estate*, in whosever hands it is; and therefore that would make no difference in the interest of the persons who were to take. It was clearly the intention of the devisor that both his daughters *Ann* and *Hannah* should take a fee; but with the condition annexed. Then the fine being in breach of that condition was a nullity at least, if it did not operate as a forfeiture; and *Ann's* moiety would descend, on her death, to her heirs at law, of whom *Hannah* was one; and as such she would take one-fourth, unless the whole moiety passed to her under the residuary clause, as surviving joint tenant. It is clear that one parcener may maintain ejectment for her share, as well as one joint tenant. The dissent of the others is immaterial, considering the fine as merely void. [*Lawrence, J.* This is not a breach of condition; but the case of a condition not performed: and in the case of a will, where a condition annexed to the devise of a fee is considered as a conditional limitation, the duration of the estate ceasing upon the non-performance of the condition, there needs no entry by the heir to determine it. Taking the whole devise together, may it not be considered as an executory devise in fee to *Ann Wait*, if she had issue; and if she had not, then a devise to such of her sisters, or their children, as she should appoint?]

[180]

Curia adv. vult.

LORD ELLENBOROUGH, C. J. now delivered the opinion of the Court. In this case three questions have been made: 1st, Whether the conditions annexed to the estates of *Ann Collett* and *Hannah Collett* be good in point of law? 2dly, As to the effect of the residuary clause? And, 3dly, Whether this ejectment can, under the circumstances of this case, be supported by one of several co-heirs? As to the first, we think that the condition is good; for, according to the case of *Daniel v. Ubley*, in Sir *Wm. Jones*, 137, and in *Latch*. 9, 39,

39, 134, though the Judges did not agree as to the effect of a devise "to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased," *Jones*, Justice, thinking it gave an estate for life, with a power to dispose of the reversion among the sons, the other Judges, according to his report, thinking it gave her a fee simple in trust to convey to any of her sons; yet, in that case, it was not doubted, but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken; which estate *Jones* thought the devise gave, if it did not give a life estate, with a power of disposing of the reversion among the sons: and according to *Latch*. 37. *Dodderidge* said, He conceived she had the fee, with condition, that if she did alien, that then she should alien to one of her children; and concluded his argument on this point by saying, That "her estate was a fee, with a liberty to alienate it if she would: but with a condition that if she did alienate, then she should alienate to one of her sons:" and in *Dalison's Reports*, 58, there is a case to this effect (ss.): "A devise to a wife to dispose and employ the land on herself and her sons at her will and pleasure;" and *Dier* and *Walsh* held, She had a fee simple; but that it was conditional, and that she could not give it to a stranger; but that she might hold it herself, or give it to one of her sons. These cases shew that the devise in question may operate as a devise on condition; for the breach of which, in levying a fine to the uses within stated, the heirs at law of the devisor will be entitled to enter; and the plaintiff, as one of them, will be entitled to one-fourth part of the moiety whereof such fine was levied, if the residuary clause do not operate as a devise over on non-performance of the condition: and we think that the residuary clause cannot be considered as a devise over; for it does not seem to have been at all in the contemplation of the devisor to make a devise over of the share of each daughter, on the breach of the condition by such daughter; but merely to dispose of those things which had not been before disposed of by the will. This brings the case to the single and only remaining question, Whether one co-heir can enter for the breach of a condition?—and it seems that he may. In assize, where one co-parcener enters,

1805.

DOE d. GILL
and Wife
against
PEARSON.

[181]

1805. **DOE d. GILL and Wife against PEARSON.** ters, claiming for herself and her companion, it vests the seisin in both. *Brook's Abridg.* tit. *Entre Congeable*, 37. Where the entry is *not* lawful, the claim of one co-parcener for herself and her companion does not vest the seisin in her companion. *E contra*, where the entry is *lawful*. *Ibid.*—The entry of one co-parcener is the entry of both as to a stranger.
- [182] *Ib. pl.* 38. If lands come to two in common, and one enters into them generally, this shall be the entry of both. 1 *Roll's Abr.* 740, letter *F. pl.* 3. If a man devise certain annuities to his four sons, out of certain lands, and devise over, that if his heir does not pay these annuities, the sons shall have the land; if the annuities be not paid, and one of the sons enter generally, this shall be an entry for all the four sons, inasmuch as they are joint tenants. *Ibid.*, *pl.* 7. Upon the whole, therefore, we think that the condition annexed to the estate devised to *Ann Collet* and *Hannah Collett* is good in point of law. That the residuary clause has no effect in this case; and that the ejectment by one of the co-heirs is good, for the purpose of recovering the share of such co-heir. Judgment for one-fourth of the share devised to *Ann Wait*.

Postea to the plaintiff.

Wednesday, The KING *against* the Churchwardens and Overseers of the
Feb. 6th. Parish of ST. JOHN MADDERMARKET, in NORWICH.

Under a local Act, 10 Ann c. 6. for rating persons to the relief of the poor in Norwich for lands, &c. stock, and personal estates in the parish, &c. and money out at interest, they are not liable to be rated for government stocks or funds, which are no more than perpetual annuities, the principal of which can never be recalled by the holder from government, though redeemable at the pleasure of the latter.

ANN SUTLIFFE appealed to the *Norwich City Sessions*, against an assessment of 100*l.* stock, charged upon her for the relief of the poor; and the justices allowed the appeal, subject to the opinion of this Court, on a case which stated in substance, That the appellant was assessed for 100*l.* stock, or personal property charged upon her by a rate, duly made and allowed, for the relief of the poor of the parish of *St. John Maddermarket*, in the city and county

of *Norwich*, by virtue of a local statute of the 10 *Ann. c. 6.* 1805.
 which enabled the churchwardens and overseers * of the poor
 of the said parish, upon the authority of a certain warrant,
 by two of the *Norwich* magistrates, framed in the words of The King
 the said Act, "To rate and assess the sum (of 137*l.* 11*s.* 10*d.*) against
 on the inhabitants, and on every parson and vicar, and on The Church-
 all and every the occupiers of lands, houses, tenements, tithes wardens, &c.
 improper, appropriation of tithes, and on all persons hav- of St. John
 ing and using stocks and personal estates in the said parish Madder-
 (of *St. John Maddermarket*) or having money out at interest, MARKET,
 in equal proportions, as near as may be, according to their NORWICH.
 several and respective values and estates." And on hearing * [183]
 the said appeal, it appeared to the said Court, That, ever
 since the passing of the said statute, lands, houses, tenements,
 stocks, and personal estates, within the said city and county,
 and money out at interest, as well without as within the said city
 and county, of the respective inhabitants within the se-
 veral parishes of the same, have been constantly assessed to
 the poor's rates, according to the circumstances of such in-
 habitants. That the appellant had not any stock or per-
 sonal estate in the said parish of *St. John Maddermarket*, or
 in any other parish or hamlet within the said city and county
 of *Norwich*, nor had any money out at interest, on real or
 personal security; but that she was possessed of "money
 vested in the public funds, or on Government security, and
 then standing in her name in the books of the Governor and
 Company of the Bank of *England*, in the 5 per cent. Bank
 Annuities;" and therefore the appellant admitted that the
 said assessment was just, if the said last-mentioned money
 was liable to be rated: and the said Court being of opinion,
 That money vested in the public funds, or on government
 security, was not, by virtue of the aforesaid Act, liable to be
 rated to the relief of the poor, allowed the said appeal, and
 relieved the said *Ann Sutcliffe* from the said assessment of [184]
 100*l.* stock, charged upon her by the said rate.

Wilson, in support of the order of Sessions, contended,
 That as the mention of coal mines in the stat. 43 *Eliz. c. 2.*
 was construed to be an exclusion of all other mines liable to
 be rated to the relief of the poor, so in the local statute of
Anne, the enumeration of particular sorts of personal estate,
 including "money out at interest," and omitting stocks, which
 are

1805.

The KING
against
The Church-
wardens, &c.
of St. JOHN
MADDER-
MARKET,
NORWICH.

are a distinct species of personal estate, must be construed to be in exclusion of the latter. *Government stock* is not like *money out at interest*. There is no means of compelling the repayment of the principal. It is a perpetual annuity, redeemable only at the will of Government. The dividends are an entire sum due and payable at a certain day to the holder, whoever he may be, of the stock on that day. They are not apportionable: the interest does not accrue from day to day, in the manner of money out at interest, which in the case of tenant for life dying before the day of payment, shall be apportioned between him and the next possessor: but supposing that *stock* came within the description of *money out at interest*, it could not be rated in *Norwich*, it not being secured on property within the parish, as it must be to make it rateable there, according to *Rex v. White*: (a) and though it may be said in general, that money out at interest follows the residence of the creditor, and is payable to him wherever he is, yet by the several Acts of Parliament the dividends on stock are made payable at the Bank, and nowhere else. However, as a general proposition, Government stocks are not rateable at all: and this is the first attempt to rate them. The stat. 4 and 5 *W. & M. c. 3. s. 26.* (and all other Acts creating new funds have the same or like clauses, and particularly the stat. 24 *Geo. 3. c. 39.* creating the stock in question) enacts, That the money lent by virtue of that Act "shall not be charged or chargeable with any rates, duties, or impositions whatsoever." The Court, therefore, will not hold stock rateable by implication, without express words in another statute.

[185]

Erskine and Best, contra. This is not a rate on Government stock; but on the interest on it, when received by the stockholder living within the parish. The construction of the Act in question has been already twice before the Court. In *R. v. Hardy*, (b) this question did not arise; but in *R. v. Lakenham*, (c) a rate made under this Act was quashed for inequality, in not assessing the personal property, consisting, *inter alia*, of money out at interest, in proportion to real property; and it appears by the case, that ever since the

(a) 4 Term Rep. 771.

(b) Cowp. 579.

(c) Hil. 25 Geo. 3. 1 Const. Appx. 587.

passing of the Act, money out at interest *without*, as well as within, the city has been constantly rated. The very expression of “money out at interest,” seems to be used in the Act in contradistinction to the other species of property mentioned in the *parish*; and evidently meant *all* money of the *parishioners* out at interest, wherever it might be. *Stock* is merely one mode of investing *money* at interest. *Money*, as there used, cannot be taken literally; and would certainly include notes or other securities advanced to the borrower, for which interest was payable. *Dividends* are no more than *interest*. Having money out at interest, does not necessarily imply a loan which can be recalled at pleasure. It may be irrevocable for a certain number of years, or till a certain event: and now a fund is established for the redemption of it within a certain period. Nor can it make any difference whether the public or an individual be the debtor.

LORD ELLENBOROUGH, C. J. *Money* out at interest, however the lender may stipulate not to call for the principal for a given period, is still a *loan* of money, with forbearance for a certain time. It implies that the principal is to be repaid at some time or other, when the lender will be entitled to receive it as *money*; and not a substitute for the principal in a mere annuity: but with respect to stock, the payment of the principal can never be compelled. All that the Government engage for, is a perpetual annuity, redeemable at their own will and pleasure. In a case of this sort, we can only be guided by the plain sense of the *words* used by the Legislature. We are upon the construction of the positive letter of the statute. It is admitted, That if this species of property do not come within the words, having “money out at interest,” it does not fall within any other description of property directed to be rated. Then can we say, That *stock* is “*money* out at interest?” *Money* out at interest must mean that which is capable of being recalled at some time or other,—*money* which may or may not be *out at interest*, and is only rateable when so used. Is that at all applicable to the funds, where the whole principal money is sunk in an annuity, and cannot be recalled, though in this stock parliament have reserved a power of redemption? If this then be not rateable within the particular local Act, neither is it rateable within the stat. 43 *Eliz. c. 2.* (the only other statute
by

1805.

The KING
against
The Church-
wardens, &c.
of St. JOHN
MADDER-
MARKET,
NORWICH.

[186]

1805.

The KING
against
The Church-
wardens, &c.
of St. JOHN
MADDER-
MARKET,
NORWICH.

by which it could be taxable) not being local visible property within the parish. It is not, therefore, rateable under either statute.

GROSE, J. Both the local Act and the stat. 43 *Eliz.* are very particular in enumerating different species of property subject to be rated. That this is not within any description of property mentioned within the parish is clear; and the only question is, Whether it must be considered within the description of *money out at interest*? But that does not mean money vested in annuities, but money lent, of which the lender may recall the principal, and the borrower is bound for the repayment of it. It is not therefore within any of the descriptions of property which the Legislature have particularized: and it is more probable, if they had meant to have rated *stock*, they would have named it in terms, as they have done other things.

LAWRENCE, J. If ability alone were the criterion of rating, all persons would be rateable in respect of their property, whether locally and visibly situated within the parish or not: but it has been determined, again and again, That a person can only be rated for local visible property within the parish. The appellant was therefore not rateable under the general law; and for the reasons stated by my Brothers, I am of opinion, That she was not rateable for her stock as for money out at interest. (a)

Order of Sessions confirmed. (b)

(a) Le Blanc, J. was absent, from indisposition.

(b) An agreement to pay a per centage, when any money should be received by the defendant, through the plaintiff's means,—held not to extend to a transfer of stock to the defendant, in consequence of the plaintiff's information. *Jones v. Brinley*, 1 East, 1.

1805.

AVESON against Lord KINNAIRD and Others.

Wednesday,
Feb. 6th.

THIS was an action on a policy of insurance, dated 22d November, 1802, whereby the defendants, for a certain consideration, insured the life of the plaintiff's wife, *then warranted in good health*, and of the description set forth in a certain certificate, signed, &c. and dated the 9th of November, 1802, and engaged to pay to the plaintiff 1500*l.* within three months after her death; and the plaintiff averred, That she died on the 29th of April, 1803. The defendant pleaded, 1st, That the plaintiff's wife was not in good health, nor of the description set forth in the said certificate at the time of making the policy; and, 2dly, Negating the plaintiff's averments, That she was in good health, and not afflicted with any disorders tending to shorten life. On these issues were taken; and at the trial before *Graham, B.* at the last *Lancaster* assizes, the question was on the truth of the warranty; and, amongst much other evidence, which went principally to shew the general good state of the wife's health, and that she was not habituated to hard drinking, the plaintiff called the surgeon, from whom he had obtained the certificate of his wife's health on the 9th of November, 1802, who swore positively to his belief of her good health on that day, though before a stranger to her; and stated, That he observed her very minutely on that account; and formed his opinion from an examination of her general appearance, her pulse, complexion, and other circumstances,* and principally from the *satisfactory answers she gave to his enquiries*. On the part of the defendants, much evidence was given to shew, That the plaintiff's wife was in a settled habit of immoderate drinking, so as to have affected her health at the time of the insurance, and rendered her life not insurable. The principal question, however, arose on the evidence of one *Susannah Lees*, who, being an intimate acquaintance of Mrs. *Aveson*, called accidentally upon her in November, 1802, soon after her return from *Manchester*, where she went to obtain the certificate of her health, on which the policy

In an action by the husband upon a policy of insurance on the life of his wife, declarations by the wife, made by her when lying in bed apparently ill, stating the bad state of her health at the period of her going to M. (whither she went a few days before, in order to be examined by a surgeon, and to get a certificate from him of good health, preparatory to making the insurance) down to that time, and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admissible in evidence to shew her own opinion, who best knew the fact of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to M. and the day on which such declarations

were made: and particularly after the plaintiff had called the surgeon as a witness, to prove that she was in a good state of health when examined by him at M.; his judgment being formed in part from the satisfactory answers given by her to his enquiries.

was [189]

1805. was afterwards effected, and “found her in bed at 11 o’clock in the forenoon.” *Mrs. Aveson then said she was very poorly; that she had been to Manchester the Tuesday before, and that her husband had been insuring her life; that she was not well when she went: and she spoke in a faint way. It was then objected, by the plaintiff’s counsel, That what she said was not evidence; but the learned Judge admitted the evidence, considering that what the surgeon, called on the part of the plaintiff, had sworn as to the state of health of Mrs. Aveson, was, in a great measure, founded on her answers to his enquiries; and as, in general, any opinion of the state of health of a person must partly be formed on the account which such person gives of his complaints. The witness then proceeded to state, That Mrs. Aveson then told her, “That she was poorly when she went to Manchester, and not fit to go: that it would be ten days before the policy could be returned; and she was afraid she could not live till it was made, and then her husband could not get the money.” The whole case was afterwards left to the jury, Whether, from the evidence of Mrs. Aveson’s habit of excessive drinking, as proved by the defendant’s witnesses, they were satisfied that, “at the time of the insurance, the mischief was actually done, and her constitution then radically impaired, so as not to be a good life within the meaning of the warranty:”—and the jury being of that opinion, found a verdict for the defendants. A rule nisi was obtained in Michaelmas Term last, for setting aside the verdict and granting a new trial: 1st, On the ground of a supposed misdirection of the learned Judge to the jury, That if they thought that, at the time of the insurance effected, the immoral habit of the wife in excessive drinking, was so rooted in her as to endanger her life by its probable continuance, and this known to the plaintiff at the time, it would avoid the insurance: but this ground was afterwards disavowed, and removed by the report. 2dly, On the ground that the evidence of *Susannah Lees*, as to the conversation which *Mrs. Aveson* held with her, was improperly admitted; being no more than evidence of hearsay of the wife against her husband.*

[190]

Park, Topping, and Wood now shewed cause against the rule, on the second ground of objection. The evidence of
what

what the wife said recently after the insurance of her life was effected, was admissible, both in respect of the circumstances under which it was said, and in answer to other evidence of the same kind brought forward by the plaintiff.

1805.

—
AVESON
against

Ld. KINNAIRD

1st, The subject of insurance being her own life, and the question affecting her own state of health, of which no one could have so competent a knowledge as herself, whatever was said by her on that subject, at times and under circumstances when collusion could not be suspected, formed part of the *res gestæ* of the subject of enquiry, and was substantially put in issue by the several traverses. The particular expressions were used by the wife recently after the insurance effected, when she was lying in bed at an unseasonable hour of the day, apparently very ill, and her voice faint. The answers given by Mrs. *Aveson* to the witness's enquiries are explanatory of the situation she was found in, and the appearance of illness exhibited by her, and are naturally connected with the transaction. The witness did not go there to entrap her, nor had any knowledge of the policy having been effected when she called. When an act is done, to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from whence the motive may be collected, is part of the fact,—part of the *res gestæ*; as where the question is, Whether a trader ordered himself to be denied when at home, or left his house, in order to delay creditors?—what he said at the time of the act done must necessarily be admitted to explain it, though not what he said at another time. *Ambrose v. Clendon*, (a) and *Bateman v. Bailey*. (b) 2dly, The evidence of the surgeon who examined Mrs. *Aveson*, and furnished the certificate, was given by the plaintiff as to the state of her health; which knowledge, being a stranger to her before, he must have in part, if not principally, collected from what she said to him; and consequently what she said to others on the same subject must equally be evidence; and the rather, indeed, because not said to answer any professed purpose at the time.

[191]

Cockell, Serjt. *Scarlett*, and *Richardson* in support of the rule. The rule was established in *Rex v. Cliviger*, (c) that

(a) Rep. temp. Hardw. 267.

(b) 5 Term Rep. 512

(c) 2 Term Rep. 263.

1805.

AVESON
against

Ld. KINNAIRD
* [192]

the declarations of husband and wife cannot be received in evidence against each other, either civilly or criminally, nor * even if they have a tendency only to criminate each other. Now here the wife's declarations had a manifest tendency to shew her husband guilty of a fraud. [Lord *Ellenborough* and *Grose*, J. observed, That in the case cited, the question put to the wife went directly to criminate the husband.] But *Ashhurst*, J. said, in that case, That the objection was not confined merely to cases where the husband or wife are directly accused of any crime, but extended even to collateral cases, where their evidence tends that way. Neither can it make any difference that the cause of action is in respect of the wife; for even where the action was brought by the husband in right of his wife, her declarations could not be given in evidence to shew that he was not entitled to recover. *Alban and others v. Pritchett*. (a) The rule of law is general; and extends even to cases where the wife is afterwards divorced from her husband. (b) [Lord *Ellenborough*, C. J. That goes on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation.] So neither shall it be violated after her death; for the reason of the rule is general, to preserve the peace of families; and the question must be, Whether it were evidence at the time? But the effect of the evidence here is to make her violate the confidence which subsisted between them at the time. In *Monroe v. Twisleton*, (b) which was assumpsit for the board and lodging of the defendant's infant child, Lord *Alvanley* said, That a wife shall not reveal matters of confidence imparted to her by her husband. [Lord *Ellenborough*. I doubt whether what Lord *Alvanley* there said was meant by him to be applied to the circumstances of that case; for it is generally considered that matters of domestic concern are entrusted to the wife: I rather consider him to have mentioned it as general doctrine, that trust and confidence between man and wife shall not be betrayed; and as such it is sound doctrine.] But independent of the objection to the evidence, as coming from the plaintiff's wife, it is open to the general objection of hearsay evidence: much of it at least, being no part of the *res*

[193]

(a) 6 Term Rep. 680.

(b) Peake's L. of Evid. 174. App. 44. Edit. of 1804.

gestæ, as it is said to be. Her reason for being found in bed at the time that she was then unwell, might perhaps be admissible as a declaration accompanying an act; but what happened at *Manchester*, the motives of herself and her husband in going there, and how she was at that time, and her future apprehensions concerning the policy, were no part of the *res gestæ*, nor capable of being proved by hearsay. Declarations by the wife, upon her elopement from her husband, accusing him of misconduct, could not be given in evidence against him in an action against the adulterer; and yet the character of the wife and husband, are as much implicated in the inquiry of damages there as the health of the wife was in this case. [Lord *Ellenborough*. It is not so clear that her declarations, made at the time, would not be evidence under any circumstances. If she declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence: though not if it were a collateral declaration of some matter which happened at another time. His Lordship also referred to the case of *Thompson et Uxor v. Trevannion, Skin. 402*, where, in an action by the husband and wife, for wounding the wife, Lord C. J. *Holt* allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gestæ*.] With respect to the examination of the surgeon laying a ground for letting in this evidence, the two cases are very dissimilar. The *opinion* of a medical man upon the state of a person's health, which is the object of inquiry, is evidence *per se* from the necessity of the case; therefore, the grounds of his opinion are collaterally let in as evidence also; in which light only the answers of the wife to his inquiries become examinable; and there is less ground for suspicion of the truth of such answers given to a professional man, whose advice is presumed to be asked, with a view to be acted upon, and where the party therefore has a direct personal interest to answer truly, than where loose conversations are held with other persons, from which no consequence is expected to ensue. Besides, no objection was made to his evidence; and therefore if her answers to him were improperly received in evidence, that

1805.

—
 AVESON
 against
 Lord
 KINNAIRD.

[194]

1805.

—
AVESON
against
Lord
KINNAIRD.

would not be ground for receiving other evidence, which was objected to.

[195]

Lord ELLENBOROUGH, C. J. This case has been argued with greater scope than the immediate question we have to decide appears to warrant. No confidence has been violated,—nothing extracted from the bosom of the wife which was confided there by the husband: but the question being, What was the state of her own health at a certain period?—a witness has been received to relate that which has always been received from patients to explain, her own account of the cause of her being found in bed at an unseasonable hour, with the appearance of being ill. She was questioned as to her bodily infirmity. She said it was of some duration;—several days. She assigned her going to *Manchester* as a period when she was labouring much under the disorder. Then if inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time, this must be evidence. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. The substance of the whole conversation was, that the wife had been ill at least from the 9th of *November*, when she was examined by the surgeon, and certified to be in good health, down to the day when the conversation took place; and those appearances were exhibited to the witness; and in that view I think the evidence was unexceptionable. It was also evidence in another point of view; for if the plaintiff produced the surgeon as a witness, to shew, from his examination of the wife, and what she told him, That she was in a good state of health, and an insurable life on the 9th of *November*,—this was but a sort of cross examination, as it were, of the same witness, to shew, from what she had said of herself to another person, that she was not really well when she told the surgeon so on that day. One who was an attesting witness to the supposed execution of a bond died; and, after his death, an action was brought on the bond, and his hand-writing was proved: but I, then of counsel for the defendant, was permitted by Mr. Justice *Heath* to give in evidence, That the attesting witness had, in his dying

dying moments, begged pardon of Heaven for having been concerned in forging the bond ; and I was permitted so to do, on the authority of the case of *Wright v. Littler*, (a) which I cited, where similar evidence of a dying * confession by the subscribing witness to a deed was admitted by Lord C. J. *Willes*, and afterwards approved by the Court. Mr. Justice *Heath* admitted the evidence, on the ground that if the subscribing witness could have been produced at the trial to prove his hand-writing to the bond, inasmuch as I might have cross-examined him as to the fact, so I might also prove his declaration of the fact, in contradiction to the presumption of a due execution of the bond from the proof of his hand-writing as a subscribing witness. The admission then of the evidence in this case is free from any imputation of breaking in upon the confidence subsisting between man and wife. The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that too made unawares, before she could contrive any answer for her own advantage and that of her husband ; and, therefore, falling within the principle of the case in *Skinner*, which I have alluded to.

GROSE, J. It is proper to consider what the question was, and what was meant to be proved by the declarations of the wife. The question in the cause was concerning her state of health at the time of the insurance effected ; and in order to ascertain that, it became material to inquire, What the state of her health was, between the time of her first examination by the surgeon, and the time when she was seen by the witness who conversed with her ? The first question put to the witness was, In what situation she found Mrs. *Aveson* when she called ? The answer was, In bed. To that there could be no objection. The next question was, Why was she in bed ? Now who could possibly give so good an account of that as the party herself ? It is not only good evidence, but the best evidence which the nature of the case afforded. It is true, that she added something about the insurance of her life in the course of explaining what the state of her health really was at the time ; but the whole taken together, is evidence to shew what her own opinion of her health was at the time of the insurance ; and on that

1805.

—
 AVESON
 against
 Lord
 KINNAIRD.
 * [196]

[197]

(a) 3 Burr. 1255.

1805.
 —
 AVESON
 against
 Lord
 KINNAIRD.

ground I think it was evidence ; but I also think the evidence was properly admitted on the other ground stated by my lord. For she had been examined by the surgeon as to her state of health on the 9th of *November*, and the surgeon was called as a witness by the plaintiff, to prove what, in his judgment, was the state of her health when he examined her ; which judgment was in course formed in part from her answers to his inquiries. Then her subsequent declarations were evidence to shew, that in truth she was not in the state at the time which she represented herself to be in to him. In strictness, such declarations are admissible not so much as evidence of confession of the wife against her husband, as of the actual state of her health in her own opinion at the time ; but in getting at this opinion, it is impossible to help particular expressions mingling with it, and coming out from the witness to explain that fact, which are not evidence of the particular facts alluded to ; but they were not tendered or received as evidence of such particular facts.

LAWRENCE, J. I am of the same opinion. One ground of objection is, That the account given by the wife to *Susannah Lees* went to criminate her husband, by shewing him guilty of a fraud ; but that does not follow ; for it is only the conception of the wife, that if she died before the policy was returned, her husband would lose the benefit of it. She did not mean to criminate, nor did she appear to conceive that she was criminalizing either herself or her husband by that expression. As to the general ground of objection to the evidence as hearsay, it is in every day's experience in actions of assault, That what a man has said of himself to his surgeon is evidence, to shew what he suffered by reason of the assault. The wife was found in bed at an unusual time ; she complained of illness, and naturally answered her friends' inquiries by describing how long her health had been bad ; and she carried it to a period antecedent to her examination by the surgeon at *Manchester*. In order to know whether she were in a good state of health on the day of the insurance, it was material to ascertain what the state of her health was both before and after that day. If what she said to *Susannah Lees* were not evidence against her husband, then what she said to the surgeon could not be evidence for him ; yet the testimony of the surgeon was brought forward

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by the plaintiff, in order to shew that the woman was an insurable life at the time. The plaintiff had, therefore, made it evidence by his own examination of the surgeon: and if that were evidence when making for him, the same sort of examination could not cease to be evidence because it turned against him. But even if every thing said by the woman were struck out on the one side, and the evidence of the surgeon founded on his examination of her and her answers to his inquiries on the other side, there would still be abundant evidence to shew that this verdict was right. (a)

Rule discharged.

(a) Le Blanc, J. was absent, from indisposition.

BENTINCK *against* DORRIEN and Another.

[199]

Thursday,
Feb. 7th.

THE Plaintiff brought an action as indorsee of a bill of exchange against the Defendants as acceptors; which action was referred to Mr. Serjeant *Bayley*; who reciting in his award that it appeared to him that the said bill, drawn by Mr. *Rygerbos* of the *Hague* on the defendants in *London*, was left by the plaintiff, to whom it had been indorsed, for acceptance with the defendant on the 31st of *May* last, and that they had signed an acceptance thereon; but that on the 1st of *June* following, and before the bill was called for, they had cancelled that acceptance: and that also it appeared to him, the arbitrator, upon the production of the bill, that the plaintiff had caused it to be noted for non-acceptance; was thereupon of opinion, that the plaintiff by such noting it for non-acceptance, had precluded himself from insisting that the defendants had by law bound themselves to pay the bill; and, therefore, awarded for the defendants. A rule *nisi* was obtained on a former day for setting aside the award as bad on the face of it, upon the ground that an acceptance of a bill once made, could not be retracted in point of law: which rule

Lawes was now called upon to support; who contended for the general principle, That acceptance of a bill could not be gotten rid of by cancellation; for as soon as the acceptance

1805.

AVESON
against
Lord
KINNAIRD.

Whether or not an acceptance of a bill once made by the drawee may be cancelled or recalled by him before the bill be delivered back to the holder, at all events if the acceptance be so cancelled, and the holder cause the bill to be noted for non-acceptance, he cannot afterwards sue upon it as an acceptance.

1805.
BENTINCK
against
DORRIEN.
[200]

ance was written, third persons acquired an interest in it, which could not be divested by the subsequent act of the acceptors alone; and he referred to the *Hamburgh* ordinance, where that is laid down: and which had been recognized to be the law of merchants here in a case of *Tummer v. Oddie*, sittings after *Easter Term* 1800; where a bill having been left for acceptance, and once accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state, Lord *Kenyon*, C. J. was clearly of opinion, That the acceptance once made could not be revoked; and that the acceptor was still bound. [And in answer to an observation by the Court, That the plaintiff himself had agreed to treat it as a non-accepted bill, he said,] That the protesting the bill for non-acceptance was the act of the notary, and a wrong conclusion of his in point of law; which ought not to prejudice the plaintiff, if by law the acceptance is in force.

Lord ELLENBOROUGH, C. J. The rule is certainly laid down in the *Hamburgh* ordinance, as stated, That an acceptance once made cannot be revoked; though, to be sure, that leaves the question open as to what is an acceptance, whether it be perfected before the delivery of the bill: but I should consider the general question as one of great magnitude, and worthy to be considered in the most solemn manner before it is decided, That after an acceptance once clearly made, it could be explained away by any obliteration of it *ex parte*. I can readily conceive that great inconvenience would ensue from letting in such a practice: but the difficulty here is to bring this case within the general rule of an acceptance once made; where the holder himself agrees to consider it as no acceptance, and acts accordingly by getting it protested for non-acceptance. Can he then blow hot and cold, and revoke all that he has before done as done unadvisedly, and now say that he will consider it as an acceptance? I was struck at first with the consideration

[201]

how far this might affect the rights of third persons; but on further consideration, if this be an acceptance in law, notwithstanding the obliteration before delivered to the holder, it will still remain so as to such third persons. But I think that this plaintiff has concluded himself by the act of his authorized agent, from contending that it is an acceptance.

If

If the notary has acted improperly, and without authority, the plaintiff has his remedy against him.

1805.

BENTINCK
against
DORRIEN.

LAWRENCE, J. When the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance, while it is yet in the hands of the drawee; and where he obliterated it before any communication made to the holder.

Per Curiam,

Rule discharged.

Park, who was to have shewed cause against the rule, referred to *Sproat v. Matheus*, (a) where the plaintiff, who had caused a bill to be noted for non-acceptance which had been conditionally accepted, was considered to have precluded himself from afterwards insisting upon it as an acceptance.

(a) 1 Term Rep. 185.

[202]

PARR against ANDERSON.

Thursday,
Feb. 7th.

THIS was an action upon a policy of insurance on the ship *Mercury*, in which the adventure was described to be "at and from *Liverpool* to the ship's ports and places of trade on the coast of *Africa* and *African* islands, during her stay and trade on the said coast and islands; and at and from thence to her final port or place of sale, delivery, or discharge in the *British West India* Islands, &c. without liberty to stop, touch, and trade at any place," &c. in the course of the voyage. Declared to be "with or without letter of marque." The cause was tried before Lord *Ellenborough*, C. J. at the sittings at *Guildhall*, after last *Trinity* Term, when it appeared that the ship sailed from *Liverpool* on the voyage insured, and reached the coast of *Africa*, and traded there. That while she was on the coast she met with another *English* vessel, called the *Sparrow*, and soon after, they known at the commencement of such chasing to be an enemy or not; or whether those words are to be confined to a leave to employ force only for the purpose of defence (including a liberty of attack and chase only so far as they may be fairly supposed to promote ultimate security) must, in the absence of any legal decision as to their construction, depend upon the received practice and known sense of commercial men, if any such received practice there be in the use of them. And therefore the cause was referred to another trial, to ascertain the commercial usage and practice in that respect. But, at any rate, such words do not appear to authorize direct cruising out of the course of the voyage in search of prize,

SAW

1805.
 PARR.
 against
 ANDERSON.

[203]

saw a *French* corvette with another vessel, which afterwards turned out to be an *English* vessel, which had been captured by the corvette; and which prize, coming across the course of the *Mercury*, was taken possession of by her without going out of her way, and the prisoners were distributed between the *Mercury* and the *Sparrow*, and the prize sent to *Liverpool*. Soon after, the *Mercury*, pursuing her course, saw a sail to leeward, which turned out to be a *Spaniard*, a quarter of a point upon her leebow; whereupon the *Mercury* altered her course a quarter of a point, and after pursuing the *Spaniard* about a quarter of an hour, with the wind right a-head, when she abandoned the chase, and continued her voyage, and arrived safe in the *West Indies*, and was afterwards wrecked in the course of the voyage described in the policy. And the sole question was, Whether this chasing for a quarter of an hour out of the direct course of her trading adventure, were or were not a deviation? the plaintiff contending that the liberty of carrying a letter of marque, authorized the ship to chase any vessel which came in sight in the course of the voyage, as contra-distinguished from cruising in search of prize: that otherwise the liberty was nugatory, as without any letter of marque it was lawful for every vessel to defend itself against an enemy. The Defendant on the other hand contending that the liberty to carry a letter of marque gave no authority to the vessel to go out of her course to chase or cruize; which necessarily leading to hostile attack, and in case of making prize to the diminution of her own crew, very materially altered and increased the risk of that which was insured as a commercial adventure. But that the use of having a letter of marque was in case of resistance to, or capture of an enemy, by whom she was attacked, or on whom in certain cases she might be induced to commence the attack upon a principle of self-defence, to prevent their being treated as pirates. Lord *Ellenborough* left it to the jury, Whether the deviation in this case were for the purpose of hostile capture or defence? that if they were of opinion that it was for the purpose of hostile capture, this being an insurance upon a mere mercantile adventure, he thought that the mere liberty to carry a letter of marque, without more, would not justify such a deviation; nor give the assured a liberty of engrafting

ing on a commercial adventure an adventure for hostile capture; and then they should find for the * defendant. But if it were for the purpose of defence, which might happen in various ways, as by making a shew of confidence in the face of an enemy, with a view to deter them from an attack; or, if that could not be accomplished, with a view to obtain some advantage in the conflict, or the like, in that case they should find for the plaintiff. The jury found a verdict for the defendant.

A rule *nisi* was obtained in *Michaelmas* Term last for setting aside the verdict, on the ground of a misdirection, which was opposed by *Garrow*, *Topping*, and *Scarlett*; and supported by *Erskine*, *Gibbs*, *Park*, and *Giles*. The same subject was so recently discussed in *Lawrence v. Sidebotham*, (a) that it is unnecessary to state more than the above outline of the arguments urged at the trial.

The Court directed the case to stand over, for the purpose of making further inquiry as to the case of *Jolly v. Walker*; a short note of which is given in *Park's Insur.* 299; and which was much relied on by the plaintiff's counsel in argument. And in this Term

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court.

This was a motion for a new trial, in an action tried before me, at the sittings at *Guildhall*, after last *Trinity* Term. It was an action upon a policy of insurance, in which the adventure was described "at and from *Liverpool* to the ship's ports and places of trade on the coast of *Africa* and *African* islands, during her stay and trade on the said coast and islands; and at and from thence to her final port or place of sale, delivery, or discharge in the *British West India* Islands, &c. declared with or without LETTER OF MARQUE." The question made at the trial, was upon the effect of these latter words, by which the assured was expressly authorized to carry a letter of marque if she should think fit. On the part of the plaintiff it was contended, that these words authorized the ship carrying a letter of marque to chase any vessels, descried at whatever distance in the course of the voyage, for any indefinite period of

1805.

PARR
against
ANDERSON.
* [204]

[205]

(a) Ante, 45.

1805.
 ———
 PARR
 against
 ANDERSON.

[206]

time, and in whatever course or direction the ship insured might in virtue of such pursuit be induced to sail ; and that no deviation incurred in the course of such pursuit, discharged the underwriters. On the other hand, it was contended, that the terms of this policy having designated a mere commercial adventure between certain prescribed limits, that the liberty of taking a letter of marque must be construed with reference and as subservient to the main objects of such an adventure, incorporating only therewith such a portion of hostile risks as might arise from the use of a letter of marque, for purposes originally or ultimately of a defensive nature ; and which an act of aggression might in some cases, and with a view only to ultimate defence and safety, properly be ;—and that under such a liberty of carrying a letter of marque, no deviation from what would otherwise be the natural and ordinary course of the voyage, for the purpose of pursuing, in quest and for the chance of prize, vessels which at the time of instituting such pursuit were not even known to belong to an enemy, was warranted. To this opinion, viz. That an hostile adventure to this extent was not protected by a liberty to carry a letter of marque, I at the trial inclined, and directed the jury to that effect. The *nisi prius* case of *Jolly v. Walker, Park, 209*, was cited as an authority, That a ship having letters of marque might chase an enemy without being said to have deviated : and it was supposed that that case might resemble the present in the liberty it contains of carrying a letter of marque. But upon inspecting the policy, it is found to contain no such form of words. The voyage insured in that case was “ at and from *London* to *Cork* and the *West India* Islands, with liberty to call at *St. Eustatia* ;” and the policy contained this warranty, “ warranted to proceed on the voyage with 60 men, equipped with 22 guns, and six-pound shot, and sheathed with copper ;” which indicated an intention at least to employ, or to be prepared to employ a competent degree of force for hostile purposes. And it was contended, That it amounted to a representation at least of an intention to use the vessel as a private ship of war ; and that in virtue of her having a letter of marque, she was in a situation and had a capability of being so used. This case, supposing what the note in Mr. *Park*’s book states to have passed, affords

affords no construction of a policy containing the liberty in question, inasmuch as that policy contained no such liberty. In the absence therefore of any determination on the effect of such words, and where the words are susceptible of different meanings; where, if understood in their fullest latitude, they would authorize the acting as a letter of marque for all purposes,—that is, in other words, as “a private ship of war,” including of course the liberty of cruizing, in order to take, and of bringing into port when taken, vessels of that hostile nation against which the letters of marque are directed; an extent in which the plaintiff’s counsel have not argued that these words should be understood; where it is difficult to allow what is contended for, *i. e.* an indefinite right of chasing for the purpose of capture all vessels, and in whatever directions; and that *toties quoties*, whensoever and wheresoever successively descried, provided the original pursuit commences from a point in the course of the voyage, without suspending or superseding wholly the objects, destination, and limits of the commercial adventure described in the policy,—I say, under such circumstances of novelty in point of question, as far as respects any judicial determination upon the effect of these words, and considering the difficulties which attend the construction of them either in their most extended or limited sense, it may be material to ascertain, as a question of fact, in what manner the parties to contracts containing this form of words have acted upon them in former instances, by paying losses where deviations of the kind now in question have happened; and whether they have as yet obtained in use and practice, as between assured and assurers, any and what known and definite import,—we think it fit that for these purposes this case should undergo a second trial. If it should turn out upon a second trial, That what was done amounted to *cruizing*, then no question will necessarily arise as to the construction of the policy; unless indeed it shall be then contended (which has not been done on the present occasion) That the words in question allow a liberty to that extent; and if it shall be so contended, the evidence which the Court wishes to have brought forwards and received on this point, may be necessary towards a due determination upon the meaning of these words. It cannot but occur that these doubts might be obviated by the adoption of words of more definite import.

A liberty

1805.

PARR
against
ANDERSON.

[207]

1805. A liberty "to act as a private ship of war," would unexceptionably and conclusively convey a liberty of this kind in the largest extent; as a liberty "to chase in the course of * the voyage," would convey the more limited and restrained one. However, it is not for us to prescribe to the parties what terms they may best use in such contracts, but to decide upon the import thereof when they have obtained a known and definite one, either as adopted by the practice and use of mankind, or as recognized by the decisions of courts of law.

Rule absolute for a new trial.

Thursday,
Feb. 7th.

BEALEY against SHAW and Others.

The owner of land through which a river runs, cannot by enlarging a channel of certain dimensions through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other landowner, lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel.

THIS was an action on the case, wherein the Plaintiff declared, That on the 1st of *January*, 1799, he was possessed of certain lands, mills, and other buildings and machinery used in his trade of a whitster; and that a stream of water used to flow out of the river *Irwell* through a water-course through his land, and was used to work his said mills and machinery; and that the Defendants then, &c. injuriously widened, deepened, and enlarged certain fenders, sluices, and watercourses, leading out of a part of the river *Irwell* higher than the commencement of the plaintiff's stream, and thereby drew off and diverted from the said river a greater quantity of water than used to flow and ought to have flowed into the defendants' fenders and sluices, and continued the same so widened, &c. and the water so drawn off from thence hitherto, and thereby prevented the same from flowing to the premises, &c. of the plaintiff, by which he was deprived of the advantage of the said stream, &c. There were several other counts stating in substance the same grievance in different ways. Plea, Not guilty. At the trial before *Graham*, B. at the last *Lancaster* assizes, the

[209] short state of the case in evidence appeared to be this:—The plaintiff's and the defendants' mills, and works were both situated near the banks of the river *Irwell*, from the water of which they were supplied. The first diversion of the river was in 1724, when a mill was erected on the defendants' premises by those from whom they claimed, and a weir was made above, and the water brought from the river by means of a sluice, adequate in quantity to the wants of the then

then owners; the remainder (which was more or less according to the season, and sometimes but little in dry weather) continuing to flow as before in the natural channel. Another weir was built by the owners of the same premises about 40 years ago, and a third about 20 years ago; and as the works were from time to time enlarged, more water was taken from the *Irwell* to supply them, and no objection made, there being then no other mill on the stream in that part of the country. The present weir of the defendants was made by Messrs. *Potter* and *Crompton* (from whom the defendants immediately claimed) when they were in possession of the same premises in 1791. It was made about forty yards higher up the river; and at the same time the sluice by which their works were supplied was considerably widened and deepened, so that nearly double the quantity of water was drawn from the *Irwell* which had ever before been taken. The plaintiff's works were first erected in 1787, and his weir and sluice then first made upon his premises, which were situate lower down than the stream, and between the works of the defendants and the tail of their sluice, where the water was again returned into the bed of the river, which there made a great bend. In consequence of the alteration of the defendant's sluice in 1791, by which so much more water was taken from the bed of the river above the plaintiff's works than before, they were materially impeded, and sometimes obliged to stop working altogether. Before that time there was no complaint of want of water; but then disputes began concerning it: and the defendants still attempted to exercise acts of exclusive occupancy of the water after the complaints originated; for they put a lock on the clough, the key of which was kept by them for three years together; and applications were several times made by the plaintiff's foreman, to know when it would be convenient to the defendants to let the plaintiff have some water; and he was told that he should have it when *Shaw's* work was done. But it was agreed that a person should be kept to watch the management of the clough, so that the plaintiff might have the water immediately at all times when it was not necessarily used by the defendants: and this person was paid by both parties for his trouble; though he was in the employ of the defendants, and was desired by one of them after the enlargement

1805.

BEALEY
against
SHAW.

[210]

1805.

BEALEY
against
SHAW.

[211]

largement of the sluice was made, to keep the plaintiff quiet.' The defendants called no witnesses; but it was contended on their behalf that they and the persons from whom they claimed, having since the year 1724, down at least to 1787, had the free and exclusive enjoyment of so much of the river as they thought proper to appropriate to themselves, increasing the quantity from time to time as their occasions required, it was not competent to the plaintiff at the latter period to abridge their right by the erection of new works and making a new weir and sluice; but having placed himself between their weir and their mill-goit, he must take the river subject to the defendants' use of it. That the plaintiff could acquire no right to the use of any part of the river-water adversely to the defendants, 'by any enjoyment short at least of 20 years; and here they had only had an enjoyment for less than four years of the superfluous water, which the defendants had then no occasion for: and they, having had an unlimited use of the river for so long before 1787, could not lose that right by a non-user for so short a period; but were at liberty to appropriate to themselves as much more as they wanted, in the same manner as they had several times done before the plaintiff's works and sluice were erected and made. But that if any action lay, it should have been brought against *Potter* and *Crompton*, by whom the increased quantity of water had been originally taken in 1791, which the plaintiff had acquiesced in, and not against the defendants who had purchased under such acquiescence. The learned Judge however considered that the important period for the jury to attend to as to the question of right, was, in 1791, when it was clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluice; before which time the plaintiff's works had been erected; and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claimed. That persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use. That every such exclusive right was to be measured by the extent of its enjoyment; and if

Potter

Potter and *Crompton* had in 1791 taken more water from the river than had ever been done before by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left * to himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises, of the sluice so deepened and enlarged was a continuance of the injury, for which an action lay. That the applications by the plaintiff's foreman for leave to take the water, and the defendants having kept the key of the clough which regulated the supply of it, though strong, were not conclusive evidence against the plaintiff, but might have been done under an ignorance or misapprehension of his rights at the time. Under this direction the jury found a verdict for the plaintiff, with nominal damages; which was moved in last *Hilary* Term to be set aside, upon a supposed misdirection of the Judge, in point of law, upon the evidence; the grounds being, 1st, That the evidence of exclusive enjoyment by the defendants, and those from whom they claimed of as much of the water as they had occasion for, increased from time to time as more was wanted from 1724 downwards, was evidence to be left to the jury of their exclusive right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire any adverse title against it under 20 years' quiet enjoyment. 2dly, That here was evidence of an acquiescence on the part of the plaintiff in the defendants' claim.

Cockell, Serjt. *Topping*, *Wood*, and *Richardson*, were to have shewn cause against the rule; but after hearing the two former, the Court called on the other side to support the rule. The principal part of the contention arose on the facts given in evidence, and the manner in which the question was left to the jury, both of which were satisfactorily explained; and the propriety of the doctrine above stated to have been laid down by the learned Judge at the trial, vindicated. And as to the plaintiff's enjoyment of the water being for so short a period only as four years before the new diversion by the defendants in 1791, they contended that it was immaterial as against the defendants; for that he had the same right to appropriate

1805.

BEALEY
against
SHAW.

* [212]

[213]

1805.

BEALEY
against
SHAW.

appropriate to his own use so much of the stream as was not before enjoyed by another, as the former owners of the defendants' premises had to appropriate in 1724 the quantity they had hitherto enjoyed. But they referred to a case of *Prescott v. Phillips*, before the late Mr. Serjt. Adair, Chief Justice of Chester, in 1798, where he had ruled that nothing short of 20 years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above 19 years, which was shewn in that case, was not sufficient. And here the last increased diversion made by the defendants was much within that time; and that it was made to the prejudice of the plaintiff could not be doubted, after his appropriation of the former surplus-water to his own works.

[214]

Erskine, Park, Holroyd, and Scarlett, argued in support of the rule on the grounds before stated, and commented at length on the evidence; relying particularly on what some of the witnesses had said, that at times, within their memory, so much of the water had been drawn off by the old sluice belonging to the works now occupied by the defendants that the natural bed of the river was left nearly dry. (a) They also referred to *Cox v. Mathews*, (b) where Lord Hale said, "If a man have a watercourse running through his ground, and erect a mill upon it, he may bring his action for diverting the stream, and not say *antiquum molendinum*: and upon the evidence it will appear whether the defendant bath ground through which the stream runs before the plaintiff's, and 'that he used to turn the stream as he saw cause;' for otherwise he cannot justify it, though the mill be newly erected." And they argued that the evidence here proved that the defendants had been used to turn the stream as they saw cause, and to take as much water as it was convenient for them to have. And they denied the authority of the case of *Prescott v. Phillips* to the extent it appeared to go, as it was in common experience that juries were directed to presume a grant within 20 years under circumstances.

(a) It appeared, however, that this circumstance could only have occurred in very dry seasons, and that for a very short period, as the generality of the witnesses had never observed it in this state, though living near the spot.

(b) 1 Ventr. 237.

Lord

Lord ELLENBOROUGH, C. J. I see no ground for disturbing the verdict. If the whole evidence were left to the jury as stated by the learned Judge, there can be no question upon it; and if the verdict had been for the defendants, I think it could not have been sustained. The general rule of law as applied to this subject is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist, founded on the occupation of another. And though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long time as may raise the presumption of a grant, the other party whose land is below, must take the stream, subject to such adverse right. I take it, that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption according as it is attended with circumstances to support or rebut the right. Here it appears, that from 1724 downwards, there has been a partial enjoyment of the water of this river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things, the plaintiff in 1787 comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years, without objection from any person. Supposing the question had arisen then on that enjoyment by the plaintiff of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shewn that the occupiers of the defendants' premises were then in possession of *all* the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works, and for the very purpose of appropriating to themselves more of the water they enlarged their

1805.

 BEALEY
 against
 SHAW.

[215]

1805.

BEALEY
against
SHAW.

* [216]

sluice? After this enlargement was made of the defendants' sluice in 1791, complaints began; and in order to avoid * dispute it was agreed that the fender should be kept by a man who was employed for that purpose by both parties, and paid by both: and it appears that he was privately directed by one of the defendants *to keep the plaintiff quiet* during the time. But why *keep the plaintiff quiet* if he had no right? which it was apprehended he might assert. It is enough however to say, that after the enlargement of the defendants' sluice, it was a disputed right of enjoyment of the water; and no grant could have been presumed by the jury on such a contested enjoyment. It amounts to no more than this, that the plaintiff, to avoid litigation, agreed during that time to receive his right in a manner more abridged than he need have done; but afterwards, when the attempt was made to take all the water from him, he stood, as he lawfully might, upon his strict rights, and brought his action for the obstruction. Upon the whole therefore it is evident, that down to 1791, the defendants' right to the water had only been exercised in a limited manner; and no objection can be made to the direction of the learned Judge: and as to their enjoyment between 1791 and 1803, there was nothing to leave to the jury on which to presume a grant.

GROSE, J. The verdict is neither against law nor fact. The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it in respect of the premises which they occupied higher up the river. To what extent then did that go? It appears that prior to the year 1791 the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from [217] the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, had a right to all the water coming over that weir, which had not been carried off by such sluice. Then, in 1791, *Potter and Crompton* convert the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it: by so doing they encroached on his right, and deprived him of a benefit

benefit which was attached to his estate. It was an extension of the right before exercised by them, and a material injury to the plaintiff. But then it is said, that subsequent to the enlargement of the defendants' sluice in 1791, they kept the key of the clough, and there was an acquiescence of the plaintiff, and that he asked leave to take the water when it was not wanted by the defendants. But the whole that it amounts to is this, That all the evidence of the right being with the plaintiff down to 1791, for a small space of time afterwards (about three years) rather than have a dispute with the defendants, he consented to this arrangement, by which he expected to have the benefit of the water with their consent. But that is not to be compared with the weight of evidence in support of the plaintiff's right: and if the verdict had been against him on that ground, I should have thought that there ought to have been a new trial; and consequently I cannot say that this verdict is wrong.

LAWRENCE, J. I think the law was very correctly stated by the learned Judge at the trial; and the objection now made by the defendants to the plaintiff's claim is inconsistent with the ground on which they attempt to rest their own case. For they contend that they had a right to appropriate as much of the water as they pleased from time to time to their own use; and yet they deny the same right to the plaintiff to appropriate to his use what had not been appropriated before by any other person. In this the defendants are wrong; for if the occupiers of their premises could before have appropriated to themselves any part of the water flowing through their own lands, by the same rule those through whose lands it afterwards flowed might appropriate so much as had not been appropriated before by others. The question then is reduced to this, Whether there be any evidence to shew that the plaintiff was attempting to obtain more water than he had before the enlargement of the defendants' works in 1791? Now the evidence relied on, of leave asked of them for the water by the plaintiff, by no means shews that; for though in a case of doubt concerning the right to a thing, leave asked by one party of the other for the use of it would be strong evidence of the right; yet here there is clear evidence of what the

1805.

BEALEY
against
SHAW.

[218]

1805.

BEALEY
against
SHAW.

right was down to that period; namely, That the defendants had only a right to all the water which they could carry off in a sluice of certain dimensions, such as they had been used to enjoy prior to the year 1791, when they took upon themselves to enlarge it after the plaintiff had applied to certain uses what had before been unappropriated by them.

[219] LE BLANC, J. As to whether particular facts proved in a cause should or should not be pointedly left to the consideration of the jury, much must depend upon the manner in which the case is stated to the Judge and Jury at the time. Now here the point insisted on by the defendants at the trial was, That as prior to the year 1787, those who occupied the defendants' premises were the only persons who had works on this stream, and had taken, from time to time, as much water as they pleased, leaving the rest to flow in the natural channel, the plaintiff who came in 1787 to an estate lower down the river, had only a right to take so much as the defendants did not chuse to take at any future time. This position it was which my Brother *Graham* denied to be law; and I think he properly denied it; for the true rule is, That after the erection of works, and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards; therefore the evidence of the defendants' taking more of the water after the appropriation by the plaintiff in 1787, did not interfere with the rule of law as laid down at the trial. And there is no evidence which goes to shew that the verdict is wrong; for as to the particular facts, which it is now said ought to have been pointedly stated for the consideration of the jury, if they were not relied on at the time, and the case was not put on that ground, it is not sufficient now to say, that such or such a fact might have applied to another view of the case.

Rule discharged. (a)

(a) In an action on the case between *Duncombe* and *Sir Ed. Randall*, for the diversion and stopping of a river, it was agreed by the Court, That if one had anciently ponds replenished by channels out of a river, he cannot change the channels if any prejudice accrue to another by that. *Hetl. 32*. But he may cleanse, though he cannot change or enlarge them. *Brown v. Best*, 1 Wils. 174.

Sir

1805.

Sir HENRY HARVEY, Knt. against COOKE and Another.

Friday,
Feb. 8th.

ASSUMPSIT was brought against the Defendants as the agents of Capt. *Milne*, to recover 4261 *l.* 4*s.* 8*d.* under the following circumstances: Capt. *Milne*, of his Majesty's frigate, *La Pique*, was, in *March*, 1796, on the *Leeward Island* station, in the *West Indies*, under the command of Admiral *Laforey*, as the Commander in Chief on that station. On the 24th of *April*, 1796, Admiral *Laforey* was superseded by Rear-Admiral *Christian*, as Commander in Chief, under whose command Capt. *Milne* put himself. On the 23d of *June*, 1796, the Plaintiff, Rear-Admiral *Harvey*, superseded Rear-Admiral *Christian* as Commander in Chief on that station. On the 14th of *September*, 1796, Vice-Admiral Sir *Hyde Parker*, not having been specially appointed to that command, arrived at *Barbadoes*, on the *Leeward Island* station, on which he remained waiting for orders from the Admiralty; and senior in rank to the plaintiff, till the 1st of *November* following, when he went to and took the command of the *Jamaica* station, leaving the plaintiff Commander in Chief on the *Leeward Island* station. On the 3d of *October*, 1796, Rear-Admiral *Christian* left the *Leeward Island* station, and sailed for *England* by orders. On the 21st of *July*, 1796, Capt. *Milne* sailed from *Demerara* to *St. Kitt's*, with a convoy of merchantmen under his care, under the particular circumstances hereinafter stated, "without any orders or directions from the plaintiff, or any other admiral for that purpose;" and on the 10th of *August* following,* proceeded without orders from *St. Kitt's* to *England* with the same convoy, and arrived at *Spithead* on the 9th of *October*, and on the next day communicated such arrival, with an account of his proceedings, to the Admiralty.

The case then stated various letters from different persons, tending to explain the reason of Capt. *Milne* leaving his station, off *Demerara*, without orders: the substance only of which succeeded the one by whom the order for being detached had been originally issued (admitting him to stand in the same situation in point of right) was not entitled to share the flag officer's share of 1-8th given by the King's proclamation* to a flag officer, directing or assisting in a capture by a ship under his command.

which * [221.]

1805.

HARVEY
against
COOKE.

which letters is here stated. (a) On the 1st of *June*, 1796, Admiral *Christian* wrote to the Governor of *Demerara*, that he should direct a ship of war to take under convoy, on the 15th of *July* next, the trade from *Demerara* to *Europe*, as on that day the ship must sail, to enable her to reach the general rendezvous in time; and to communicate such arrangement to the merchants. This communication was accordingly made; and, between the 15th and 18th of *July*, the governor received a memorial from the merchants at *Demerara*, stating, that they had made every exertion to get their ships loaded in time, in consequence of the above notification, but that no convoy had appeared; that if they waited longer, they might be too late to join the convoy at *St. Kitt's*, and that, should they proceed without convoy, they should lose their insurances, which were made on warranty of convoy. They therefore prayed the governor 'to make application to Capt. *Milne*, of *La Pique*, then at anchor off the mouth of *Demerara*, to take the trade under his convoy to *St. Kitt's*.' Then followed a letter received by Capt. *Milne* from the governor, and dated 18th *July*, 1796, inclosing an extract from Admiral *Christian's* letter, to the effect before-mentioned: and also the above memorial from the merchants, &c. in which letter the governor pressed Capt. *Milne*, in consequence of the distressed situation of the trade waiting for the expected convoy, 'to take the ships under his own convoy to the place of general rendezvous;' suggesting at the same time the necessity of his immediate and speedy return to his station, as a matter of no less consequence for the protection and defence of the colony. In consequence of the letters and memorial, Captain *Milne* sailed on the 21st of *July*, 1796, from *Demerara*, taking under his convoy the trade from thence bound to *England*, and proceeded with them to *St. Kitt's*, where he arrived on the 31st of *July*, 1796. On the 27th of *July*, 1796, being off *St. Lucia*, Capt. *Milne* dispatched a tender with a letter to Admiral *Christian* at *Martinique* (which tender arrived there on the 1st of *August* following) in which he stated that he received the admiral's letters of the 23d of *June* and 21st of *July*, after he was

(a) The Court complained of the excessive length of the case, which is here very much curtailed, long as it still appears.

under way with the trade from *Demerara*; but found no orders transmitted as mentioned. That his orders were to lay off *Demerara*, for the protection of that colony; but in consequence of the petition of the merchants, &c. and the governor's letter, and the necessity of the case (no other ship to convoy the trade having arrived as expected) to proceed without delay to *St. Kitt's*; he had complied with these requisitions, and taken charge of the convoy accordingly: which he hoped Admiral *Christian* would approve of; and that, should the convoy be gone from *St. Kitt's* before he arrived, he should wait for his (Admiral *Christian's*) orders, as some of the ships were in want of repairs, which might detain them two days. The letter to Capt. *Milne* from Admiral *Christian*, of the 23d of *June*, 1796, above referred to, stated (among other things) that the *Madras* was appointed to relieve Capt. *Milne* upon his then station. On the 1st of *August*, 1796, Capt. *Milne* being off *St. Kitt's*, received a memorial from the masters of the merchant vessels which he was convoying; in which, after stating their disappointment at not meeting the expected convoy, the danger of their remaining in those seas during the hurricane months, the vigilance of the enemy, and the large British property at stake, they earnestly pressed Capt. *Milne* to continue his convoy of the fleet, and to give directions for its sailing for *Europe*. Capt. *Milne*, expecting orders from the Commander in Chief, gave no answer to their memorial until the 9th of *August*, 1796; when the weather threatening, and the masters of the trade again pressing him to go on with them to *England*, for the reasons before stated, he determined the next morning, to stand over towards *Guadaloupe*, and, if he saw no vessel coming down, to return and take charge of them for *England*. He accordingly stood over; but finding no vessels, he returned and took charge of the convoy on the 9th of *August*, and proceeded to *England* without orders. Previous, however, to his leaving *St. Kitt's*, he wrote a letter to Admiral *Harvey* as his then commander in Chief, dated *St. Kitt's*, 9th *August*, 1796, containing an account of what he had done in respect of the ships under his convoy, up to that period: that he had before written to Admiral *Christian* for orders, but, as yet, had received no orders respecting any further proceedings. That he had received the petitions above stated, and

1803.

HARVEY
against
COOKE.

[223]

1805.
 HARVEY
 against
 COOKE.

[224]

had been expecting every hour to receive orders. That at that season, it was particularly dangerous to be in that road ; and the weather for some days past had been threatening, and so much so on that morning, that the convoy had got under way, looking upon it unsafe to remain at anchor ; in consideration of all which circumstances, and having reason to think that his tender, which he had sent for information, was captured or lost, he had been induced to inform the masters of the convoy, that if no orders came for him that day, he should on the next take charge of them again for *England* ; and that after standing off *Nevis Point*, if no vessel was seen by noon from the southward, he should return and make signal for the convoy to join him. He then stated, that he had been very uneasy at having no orders to go by : and the ships under his command being very valuable, and insured to sail with convoy, and that if bad weather happened where they then were, there would be the greatest chance of their being lost ; and that no ships ever remained there after the 1st of *August* ; he therefore hoped that Admiral *Harvey* would view his conduct in the light he meant it ; and that it was only the risk of so large a *British* property that could induce him to proceed without orders ; and added, that he had left a letter at *St. Kitt's*, to be delivered if any order should arrive, describing the track he meant to pursue ; and that he should for two or three days carry little sail. The letter then concluded, “ I hope, in your dispatches to the Admiralty, you will approve of my conduct ; I give you my honour, it is my wish at present, not to leave this station,” &c. The case then stated a letter from the plaintiff to the Admiralty, dated 13th of *September* 1796, in which he stated that *La Pique* sailed with the trade from *Demerara*, on the 21st of *July*, and did not reach *St. Kitt's* till the 31st : after the convoy had sailed. That he had ordered the *Ariadne* frigate to take the *Demerara* ships to *England* from *St. Kitt's* ; and that she had sailed on the 16th of *August*, for that purpose ; but that by a letter afterwards received from Capt *Milne*, he found that he had sailed with that convoy from *St. Kitt's* on the 10th of *August*, having received a petition, &c. (stating the reasons as before). That the *Ariadne* did not arrive until ten days after *La Pique* had sailed ; and therefore she remained on the *St. Kitt's* station. The dispatch then proceeded,

[225]

ceeded, "On the conduct of Capt. *Milne*, I beg leave to observe, that I consider his anxiety respecting the safety of the ships under his convoy, was his motive for proceeding to *England* without my orders. But I regret that he did not wait at *St. Kitt's* a few days longer, when the *Ariadne* would have arrived." Capt. *Milne* on the 8th of *October*, 1796, in *La Pique*, out of the limits of the *West India* station, viz. between the *Start Point* and the *Bill of Portland*, in the *English Channel*, captured the vessels in question in this cause, which have been condemned as prize, and the proceeds thereof received by the defendants as his agents; the eighth, or flag share of which prizes, amounts to 4261l. 4s. 8d. Capt. *Milne* arrived at *Spithead* on the 9th of *October*, 1796, and on the next day forwarded a circumstantial account of all his proceedings to the Admiralty; in which he stated his "reasons for having left *St. Kitt's* without the orders of the Commander in Chief." In this account Capt. *Milne* noticed his having, after quitting *Demerara*, dispatched a tender to Rear-Admiral *Christian* with a letter, with orders, if he should not be at *St. Lucia*, to deliver it to the commanding officer; as he had heard that Rear-Admiral *Harvey* had arrived. And in another part he noticed his supposition while at *St. Kitt's*, on not hearing of the tender, that it might have been captured, "or that Rear-Admiral *Harvey* had not sent her, supposing that he (Capt. *Milne*) might have sailed with the convoy," &c. He concluded by stating, that he had no doubt Rear-Admiral *Harvey's* dispatches would explain his not having orders sent him, and hoped their lordships would approve of his proceedings, as nothing but the risk of so great a property would have induced him to have sailed until orders from his commanding officer. The letter also mentioned the captures he had made. The secretary to the Admiralty wrote in answer to Capt. *Milne*, that the Board, under the circumstances stated by him, approved of his proceeding to *England* with the convoy.

The case then sets forth the following extracts of the King's proclamation respecting the distribution of prize. "The captain or captains of any ships of war, who shall be actually on board at the taking of any prize, shall have 3-eighths parts; but, in case any such prize shall be taken by any of our ships, &c. under the command of a flag or flags,

1805.

 HARVEY
against
COOKE.

[226]

1805.

HARVEY
 against
 COOKE.

[227]

“ flags, the flag officer or officers being actually on board, or
 “ directing and assisting in the capture, shall have one of the
 “ said three-eighth parts; the said one-eighth part to be paid
 “ to such flag or flag officers in such proportions, and subject
 “ to such regulations, as are hereinafter mentioned. The
 “ following regulations shall be observed concerning the one-
 “ eighth part hereinbefore mentioned to be granted to the flag
 “ officer or officers who shall be actually on board at the taking
 “ of any prize, or shall be directing or assisting therein. 1.
 “ That a flag officer Commander in Chief, when there is but
 “ one flag officer upon service, shall have to his own use the
 “ said one-eighth part of the prizes taken by ships under his
 “ command. 2. That a flag officer sent to command at *Ja-*
 “ *maica*, or elsewhere, shall have no right to any share of
 “ prizes taken by ships employed there, before he arrives at
 “ the place to which he is sent, and actually takes upon him
 “ the command. 3. That when an inferior flag officer is
 “ sent out to reinforce a superior flag officer at *Jamaica*, or
 “ elsewhere, the superior flag officer shall have no right to
 “ any share of prizes taken by the inferior flag officer before
 “ the inferior flag officer shall arrive within the limits of the
 “ command of the superior flag officer, and actually receive
 “ some order from him. 4. That a chief flag officer return-
 “ ing home from *Jamaica*, or elsewhere, shall have no share
 “ of the prizes taken by the ships left behind to act under
 “ another command. 5. That if a flag officer is sent to
 “ command in the out-ports of this kingdom, he shall have
 “ no share of the prizes taken by ships which have sailed
 “ from that port by order of the Admiralty. 6. That when
 “ more flag officers than one serve together, the eighth part
 “ of the prizes taken by any ships of the fleet or squadron,
 “ shall be divided in the following proportions, viz. If there
 “ be but two flag officers, the chief shall have two-third parts
 “ of the said eighth part, and the other shall have the remain-
 “ ing third part; but if the number of flag officers be more
 “ than two, the chief shall have only one-half; and the other
 “ half shall be equally divided amongst the other flag officers.”
 The question for the opinion of the Court was, Whether the
 plaintiff were entitled to recover in this action the eighth or
 flag share of the amount of the proceeds of the prizes, if any,
 and what part thereof?

Dauncey,

Dauncey, for the plaintiff. Capt. *Milne* had once put himself under the command of Admiral *Christian*, on the *Lee-ward Island* station, to whose command the plaintiff succeeded by special appointment; and was, in fact, the Commander in Chief on that station at the time when Capt. *Milne* in *La Pique* sailed from out of the limits of the station with the convoy to *England*. The prize in question was, indeed, taken out of those limits on the 8th of *October*, 1796, during which time, the chief command accidentally devolved on Sir *Hyde Parker*, as a senior officer happening to come within that station *in transitu* to another: but that has been already determined, in an action tried before Lord *Ellenborough*, not to give him any right to the Commander in Chief's share of the prize in question. [Lord *Ellenborough*. I did not decide that any body else had a right to it.] It follows necessarily, That if Admiral *Parker* was not entitled as Commander in Chief, the plaintiff was. If Admiral *Christian* had retained the chief command, he would certainly have been entitled to the Commander in Chief's share, though the prize were taken out of the limits; the plaintiff having once put himself under his command. The plaintiff then having succeeded to Admiral *Christian*'s command, is entitled to share in all prizes which he would have been entitled to had he remained. He then commented upon different parts of the correspondence, in order to shew that Capt. *Milne*, before his departure out of the limits of the station, had notice of the plaintiff having succeeded to the command in chief, and had addressed a letter to him as such; that he considered himself as placed under his command generally, and waited his orders only with respect to the particular service then required of him; informing him at the same time, of his intention to proceed if he had no orders to the contrary, and requesting his interference with the Admiralty to excuse him. That, on the other hand, the possibility of Capt. *Milne* proceeding with the convoy to *England*, was anticipated by the plaintiff, who gave orders accordingly to the *Ariadne* to take his former station in that event;—and that both the plaintiff and Capt. *Milne* were aware of the necessity of the former to appoint some ship to convoy the homeward bound trade. He concluded, therefore, on this part of the case, that Capt. *Milne* had merely anticipated the orders

1808.

 HARVEY
 against
 COOKE.

[228]

[229]

1805.
 HARVEY
 against
 COOKE.

orders which he would have received, in case no other convoy should arrive in time to take charge of the trade; and that the plaintiff had looked to such anticipation and provided for it: and that Capt. *Milne* acted throughout as considering himself under the command of the plaintiff, and referring to him for authorizing the act he was doing to the Admiralty. That the whole correspondence was inconsistent with any supposition that Capt. *Milne* was, or considered himself as acting free from the control and command of the plaintiff.

Upon the general question he argued further: that though the cases of *Lord Nelson v. Tucker*, (a) and *Lord Keith v. Pringle* (b) did not strictly apply, inasmuch as the question there arose between the chief flag officer returning home from a foreign station and the next in seniority on whom the chief command devolved;—yet, in such cases, it was considered that prizes taken by ships sent to cruize by the superior flag-officers before his departure, and which never were *in fact* under the command of the officer on whom the command devolved, were yet to be considered as acting under his authority, so as to entitle him, and not the superior officer from whom they received their cruising instructions, to the one-eighth share of the commanding flag-officer. There, indeed, the prizes were taken within the limits of the station the command of which had so devolved; but that cannot vary the right; for there is no distinction in this respect as to limits in the King's proclamation, by which this question must be governed: the only question is, Whether the Commander in Chief is *directing* in the taking of the prize?—by which has always been understood not an actual, but a virtual direction, such as is to be inferred from the captor being subjected to his command. So, on the other hand, one who is proceeding to take the chief command on a foreign station, is not entitled to share prize before he has actually assumed the command, though taken by one of his fleet after he had come within the limits of his command. There is no reference to limits, therefore, with respect to the distribution of prize, but merely to the fact of assuming the command of the station; which, *ipso jure*, places under the

[230]

(a) 4 East, 238.

(b) *Ibid.* 262.

Commander's orders all the ships attached to that station, even before any particular ship absent on a detached service within such command shall have received any actual order from the Commander. Capt. *Milne* must be presumed then to have acted lawfully, since his acts have been confirmed both by his Commander in Chief and by the Admiralty. It is not, therefore, competent to him to set up a right to retain the whole share of prize, on the ground that he was acting in disobedience to his Commander's orders, and not subject to his control. No man can set up his own avowed wrongful act, in order to give himself a right which he would not otherwise have. Case of the *Waaksamheid*, (a) of the *Robert*, (b) and of the *Forsigheid*. (c) He also referred to a subsequent proclamation, regulating, as he said, the distribution of prize, according to the principle contended for by him. But the Court said they could not take notice of such proclamation issued after the capture in question.

1805.

 HARVEY
against
COOKE.

R. Carr, contrâ. All prize was originally the right of the King, *jure coronæ*; but now the stat. 33 Geo. 3. c. 66. vests it in the captors, subject to be distributed as the King's proclamation shall direct; the plaintiff, therefore, can only claim by the terms of such proclamation, which must be construed like other instruments. (d) It is requisite by that proclamation, in order to confer the 1-8th share on a flag officer, not merely that he should be invested with the command, but that he should either have been *present* at the capture, or *directing* or *assisting* in it: the share was meant as a reward, either for actual service or advice. The plaintiff was not present at, nor can be by any construction of the words he said to have *directed* or *assisted* in the capture, because it expressly appears that Capt. *Milne* acted *without orders*; and that without having done so, the prize could not have been taken. The necessity of the case justified Capt. *Milne* in the opinion of the Admiralty; but all the documents shew that he acted on his own personal responsibility in what he did, and not by the direction, or under the orders of any superior officer. [He here commented on the several letters, stating throughout that Capt. *M.* acted *without*

[231]

(a) 3 Rob. Adm. Rep. 1. (b) Ib. 194. (c) Ib. 311.
(d) Lord Nelson v. Tucker, 2 Bos. et Pull. 262. 4 East, 250.

1805.
 HARVEY
 against
 COOKE.

[232]

orders in proceeding with the convoy to *England*; and then referred to the cases which are collected in *Johnstone v. Margetson*, (a) and in *Lord Nelson v. Tucker*, in C. B.; (b) none of which, it was admitted by the Court, bore against him on the present point.] All the cases are either where the dispute was between two flag-officers, which of the two should retain money which was sought to be taken out of his hands by the other; or where, as in the case of the *St. Anne*, (c) the prize was clearly taken under cruising orders originally received from the flag-officer; but the only question was, Whether the latter had not abdicated his command by returning home before the prize was taken, and never afterwards resuming the command? though that case was considerably shaken in *Lord Nelson v. Tucker*. He then referred to the case of the *Orion*, (d) which had then lately been determined before the Privy Council upon appeal, Lord *Ellenborough*, C. J. presiding. There Capt. Sir *Thomas Williams* of the *Unicorn*, one of Admiral *Kingsmill's* squadron on the *Irish* station, received orders from him to return to *Portsmouth* to refit, and then rejoin him with all expedition. But before his return, he received orders from the Admiralty to take a short range in the Channel for the protection of the homeward-bound trade; after which, he was to return again under his former command; and while in the execution of the Admiralty orders, he took a prize; and held by Sir *W. Scott* below, which judgment was affirmed at the *Cockpit*, that Admiral *Kingsmill* was not entitled to share, on the ground that Capt. *Williams* was not acting by the direction or assistance of his Admiral at the time; though Sir *W. Scott* supposed that there might be a connexion of subjection to Admiral *Kingsmill* remaining. [Lord *Ellenborough*, C. J. The ground of our decision was, that there was a new departure, as it were, from Capt. *W.'s* original command by the special and paramount order of the Admiralty, appointing a certain deviation from his original orders; after which, he was to return again under the command of Admiral *Kingsmill*: and the prize happened to be taken during that deviation. The consequence would have been the same

(a) 1 H. Blac. 262.

(c) 3 Rob. Adm. Rep. 61.

(b) 3 Bos. et Pull. 257.

(d) Ib. 362.

if the Admiralty had given him new orders to go back in the very track directed by Admiral *Kingsmill*. That was the opinion not only of myself, but of the Master of the Rolls, Sir *Wm. Wynne*, and Sir *Wm. Scott*.] In that case, however, Sir *Wm. Scott* said, That if a prize were taken by a ship of the squadron, even under a disobedience of orders, it would be difficult to sustain the flag-officer's right to share in it under the words of the proclamation. He concluded by saying, that at any rate the plaintiff could only be entitled to 1-3d, if any, of the share in question. But the Court said, it was not necessary to argue that point at present.

1805.

 HARVEY
against
COOKE.

Dauncey, in reply, distinguished this from the case of the *Orion*, because Capt. *Williams* was there acting under *another command* than that of his flag-officer; whereas here, Capt. *M.* referred to the plaintiff for every thing which he did. Acting under the *control and authority* of a flag-officer, is all that is meant by his *directing* a capture. It is necessarily implied, though no particular direction were given to that purpose; and it would be of very dangerous example if an inferior officer were permitted to gain any greater advantage by acting without orders in any case, than if he had done the same thing in the ordinary course of his duty.

LORD ELLENBOROUGH, C. J. The question is, Whether the plaintiff can be considered as a flag-officer entitled to share in the prize under the King's proclamation?—to do which, he must have been either “actually *on board* at the taking of the prize, or *directing* or *assisting* therein.” The only question is, Whether the facts of this case constitute a *directing* or *assisting* in the capture? Capt. *Milne's* situation was, That being one of the squadron on the *Leeward Island* station, he had received orders from Admiral *Christian*, then the Commander in Chief on that station, to lie off *Demerara* for the protection of that colony; and, it appears, that up to the time of the prize in question being taken, Capt. *Milne* never received any other order from any competent authority dispensing with the literal performance of that order; but, at the request of the governor and merchants of that colony, who were disappointed of their expected convoy, he thought it necessary for his Majesty's service,

[234]

1805.
 HARVEY
 against
 COOKE.

vice, upon his own responsibility, to convoy the trade to the place of rendezvous at *St. Kitt's*. He proceeded, therefore, in disobedience; but, as it appears from the subsequent approbation of the Admiralty, in venial disobedience to his orders: and after having prosecuted his voyage thus far, as he himself supposed in disobedience of orders, he afterwards ventured on a further disobedience, under what he thought an urgent necessity. He still paused, however, and lingered for some time longer, in expectation of another ship to relieve him; but being frustrated in that expectation, yet still desirous of doing that which was most for the King's service, he at length convoyed the fleet home; in the course of which, the capture was made. Now assuming that the relation of captain and superior flag-officer was constituted between the parties for many purposes, yet as the plaintiff who succeeded Admiral *Christian* can be said to have been directing in or privy to such orders only as his predecessor issued, and as Capt. *Milne* acted in disobedience to such orders, insomuch even that if he had complied with his orders, the capture in question could never have been made,—in no sense can it be said that the plaintiff was *directing* or *assisting* in the capture; but Capt. *Milne* must be considered altogether as having acted upon his own responsibility.

[235] He so considered it himself at the time; for he wrote to his Admiral to represent his conduct to the Admiralty on the justificatory grounds which had induced him so to act, and to hope that he would excuse him to that Board: and the Admiral in so stating it says, at the same time, that he had acted *without his orders*. Where then is the *assistance* or *direction* of the flag-officer which is to entitle him to share? These words of the proclamation are, as Sir *Wm. Scott* once observed, the title-deeds of flag-officers, and the only rule for regulating our judgment. I would not, therefore, put any construction upon them which would distort their fair meaning, but will abide by the plain letter of the proclamation which common men may understand. We have nothing to guide us but the words of it; and there is nothing which should induce us to distort the plain meaning of those words. Capt. *Milne* did not act in obedience, but in disobedience to Adm. *Christian's* orders; which, in the result, it appears that the Admiralty have approved of. However, there is no occasion

sion for us to consider whether he be entitled to the prize ; but in the absence of any direction or assistance of the plaintiff in the capture, we are bound to say that he is not entitled to any share.

1805.

HARVEY
against
COOKE.

GROSE, J. The real question is not, Whether Capt. *Milne* thought he was acting wrong ?—or, Whether he acted in disobedience to the commands of one or other of the commanders on the station ?—but, Whether he were acting under any orders at all ? Now, the plaintiff himself says in his letter to the Admiralty, that Capt. *Milne* was not acting under his orders ; and the latter, sensible of not having acted under the plaintiff's orders, writes to him to represent his conduct favourably to the Admiralty on that presumption, and wrote to the Admiralty an account of all his proceedings ; intreating the favour which so venial an offence might warrant. When all parties, therefore, concur in considering that Capt. *Milne* was not acting under the plaintiff's orders in what he did, it is impossible to say that the plaintiff was *directing* or *assisting* in the capture, which are the words of the proclamation upon which the plaintiff's claim must be founded, if at all ; the construction of which proclamation ought to be according to the plain import of the words. On this ground I am clearly of opinion that the plaintiff cannot recover.

[236]

LAWRENCE, J. The argument most in favour of the plaintiff's claim was, that Capt. *Milne*, even after his departure, continued under the command of the plaintiff : but no authority has been quoted to shew that. By the terms of the proclamation, it is expressly provided, That no flag-officer shall be entitled to share the 1-8th granted to a flag-officer, unless he shall be "*actually on board* at the taking of any prize, or *directing* or *assisting* therein." That brings the case to this short question, Whether the conduct or situation of the plaintiff can in any way entitle him to be considered as *directing* or *assisting* in the capture in question ? Capt. *Milne* was under the orders of Admiral *Christian* to continue off *Demerara* for the protection of it. Upon the plaintiff's succeeding to the chief command, the orders issued by his predecessor are to be considered as his orders. But under a necessity which he thought sufficient, Capt. *Milne*, without any order or authority, or even approbation

1805.

HARVEY
against
COOKE.

[237]

of the plaintiff, first proceeded with the homeward-bound trade to *St. Kitt's*, and afterwards to *England*. The plaintiff even expressed his wishes that Capt. *Milne* had remained longer on his station, so far from directing or assisting in what he did. The mere circumstance of Capt. *Milne* having been subject to the command of the plaintiff, is not enough to entitle the latter to share in the prize; because the proclamation itself superadds other conditions; namely, That he shall be either *on board* at the time, or *directing* or *assisting*; and I cannot consider the plaintiff as entitled to share, when, according to my understanding of those words, he did not either direct or assist in the capture.

LE BLANC, J. I should not have been sorry, on principles of public policy, if I could have found that the plaintiff was entitled to the flag-officer's share in this case, because it is not to be approved that an officer, however good his motives may have been, should derive any advantage from his disobedience of orders; but no authority has been cited to shew that he may not, in such a case; and in the absence of any decision on the point, we can only look to the words of the proclamation; which shew that no flag-officer shall share unless he be *actually on board*, or *directing* or *assisting* in the capture. It is contended, that Capt. *Milne* was acting at the time under the order of the plaintiff, because he afterwards ratified what the other did. But nothing of that kind appears; for Capt. *Milne* was under orders to remain at *Demerara*, which order was never revoked: but from motives highly laudable, he proceeded to convoy the trade to *St. Kitt's*, and from thence to *England*. Conscious, however, that he was acting all the time against orders, and on his own responsibility, he wrote to the plaintiff to excuse him to the Admiralty; and the plaintiff's own letter to that Board shews that he considered it in the same light; for he does not intimate that Capt. *Milne* had acted by his orders, or even with his approbation; on the contrary, he expressed his wishes that he had waited longer for the ship which had been designed to act as convoy. And again, Capt. *Milne*, in his letter to the Admiralty after his return home, excuses himself for what he had done by the necessity of the case. Therefore, unless there were some authority for saying that an officer, who has in fact acted in direct contradiction

[238]

contradiction to orders, can be said to have acted under orders so as to entitle his superior officer to be considered as having assisted or directed him in the capture, I cannot say that the plaintiff has entitled himself to share within the terms of the proclamation,—though I should consider every capture made by a ship of a squadron acting under the command, and in obedience to the superior officer of such squadron, as a capture made under the direction or assistance of such superior officer.

Postea to the defendant.

EX parte BROCKE.

Saturday,
Feb. 9th.

A WRIT of *habeas corpus* having issued to bring up the Defendant, an impressed seaman, for the purpose of his discharge, on the ground of exemption, as an apprentice in the *Greenland Fishery*, it was moved on a former day to quash the writ *quia improvide emanavit*: when the facts appeared to be that *Brocke*, in *March*, 1801, being then above the age of 14 years, was apprenticed to one *Morsom* for five years in the *Greenland Fishery*, with whom he continued till he was impressed in *October* last, being then above the age of 18 years, and having served more than three years of his time. The statute 26 *Geo. 3. c. 41. s. 2.* requires that every ship in the *Greenland* * *Fishery* “shall have on board apprentices indentured for three years at least, who shall not exceed 18, nor be under 14 years of age at the time they shall be so indentured, in the proportion of one apprentice at the least for every 35 tons burthen:” which apprentices shall be reckoned in the number of men required to be on board. *Sec. 17* exempts certain persons employed in the fishery from being impressed; but does not mention apprentices. Then the stat. 29 *Geo. 3. c. 53. s. 5.* reciting the former and other Acts relating to the same fishery, and that it is expedient to oblige the masters of ships to whom such apprentices shall be bound to keep them in their service for the time they shall be indentured, enacts, “That if any master to whom any apprentice shall be indentured, pursuant

1805.
HARVEY
against
COOKE.

An apprentice in the *Greenland Fishery* is no otherwise exempted from being impressed than under the general Act of 13 *Geo. 2. c. 17.* which exempts all persons from being impressed before the age of 18, and every person who not having used the sea, shall bind himself apprentice to serve at sea for the first 3 years of such apprenticeship.

* [239]

1805.
 Ex parte
 BROCKE.

to the said Acts, shall permit him to quit, leave, or depart his service on any pretence whatever (with an exception not material to state) before the expiration of the term for which he shall be bound, every such master shall forfeit 50*l*." &c. The stat. 42 Geo. 3. c. 22. continues the several Acts, and protects certain descriptions of persons (not mentioning apprentices) from being impressed according to certain proportions of burthen.

[240]

Jervis (and *Garrow* was with him) in applying for the rule to quash the writ of *habeas corpus*, observed, That it was not the object of the above-mentioned Acts to protect apprentices in the *Greenland* trade from being impressed; but that their protection depended altogether upon the general Act of the 13 Geo. 2. c. 17; which first exempts from being impressed "every person, not having attained the full age of 18 years;" and then enacts, s. 2. that "every person who not having before used the sea, shall bind himself apprentice to serve at sea, shall be exempted from being impressed for three years from the binding." Now here the party had been bound for more than three years, and was above 18 years of age when impressed: and that the policy of the several statutes was to make a quick succession of apprentices bred to the sea.

Erskine and *Holroyd* shewed cause, and argued for the continuance of the exemption from the requisition of the stat. 26 Geo. 3. c. 41, That masters of vessels in this trade should have a certain number of apprentices in proportion to their tonnage, to be bound for *not less* than three years, which therefore gave them a latitude to bind apprentices for a longer time; followed up as it was by the stat. 29 Geo. 3. c. 53. s. 5. obliging them to keep such apprentices in their service for the term for which they shall be bound, under a penalty of 50*l*.; and observed, That the legislature could not be so inconsistent as to make these provisions, if they were liable to be defeated, and the masters subjected to the penalties, by means of their apprentices (of which the master here had only his proper number, including *Brocke*) being impressed against their consent. They also referred to the stat. 2 Geo. 3. c. 15. s. 22. as exempting apprentices bound for five years in the fisheries from being impressed;
 but

but the Court said that was confined to the fisheries on the coast of *Great Britain*.

1805.

Ex parte
BROCKE.

LORD ELLENBOROUGH, C. J. No person in the *Greenland Fishery* is required to take apprentices for more than three years; and if for their own convenience they chuse to have them bound for a longer period, which they are not restrained from doing, it is at their own risk. The special provisions against impressing particular descriptions of seamen in the *Greenland Fishery*, without naming apprentices, shews that the Legislature meant to leave their exemption upon the general law of the 13 *Geo. 2. c. 17*.

[241]

Per Curiam, Rule absolute for quashing the writ.

SCURFIELD against GOWLAND.

Saturday,
Feb. 9th.

IN assumpsit for money had and received, tried before Lord *Ellenborough*, C. J. at the Sittings after last Term, it appeared that the Defendant had granted to the Plaintiff a certain annuity secured by a deed, a bond, and warrant of attorney to enter up judgment in *C. B.*; but in the memorial of the annuity, the latter instrument was stated to be a warrant of attorney to enter up judgment in *B. R.*: and judgment having been afterwards entered up by mistake in this Court, the defendant had applied to set aside the annuity upon this error in the memorial, and to have the securities delivered up to be cancelled: and this Court did accordingly set aside the judgment, and direct that the warrant of attorney should be delivered up to be cancelled, (a) but made no order as to the deed or bond, which remained uncanceled; nor was there proof of any offer having been made by the plaintiff to the defendant to deliver up or cancel them. This action was brought to recover back the consideration money, the consideration for the annuity having failed. But it was objected at the trial, that the action of as-

Where the grantor of an annuity applied to have it set aside on motion, and to vacate a judgment which had been irregularly entered upon a warrant of attorney, which was given for entering up judgment on a bond in another court to secure the annuity, and which warrant of attorney was improperly described in the memorial; and this Court accordingly set aside the judgment; held that the grantee might recover back the consideration money in assumpsit, and was not put to his action on a bond which was also given for securing the annuity, and which bond was not ordered to be cancelled, though voidable in pleading by virtue of the Annuity Act.

(a) It was asked by *Le Blane*, J. how the warrant of attorney which was to enter up judgment in *C. B.* came to be set aside, that not being consequential upon the vacating of the judgment in this Court, which has no foundation for it: but no account could be given of it.

sumpsit

1805. **SCURFIELD**
 against
GOWLAND.

sumpsit would not lie, the plaintiff still having his remedy upon the bond and deed: and on this ground the plaintiff was nonsuited.

It was moved on a former day to set aside the nonsuit, on the ground that the defendant having elected to set aside the annuity, and applied to the Court for that purpose, and the Court having pronounced judgment upon the illegality of it, and vacated the warrant of attorney and judgment given to secure it, it was not competent to the defendant now to set up this objection upon the ground that the annuity was still secured by subsisting instruments, the illegality of which were declared; and that it was nugatory to oblige the plaintiff to bring his action in the first instance on the bond or deed, to put the defendant to plead the special matter, and shew that they were void under the Annuity Act by the judgment of the Court, in order to enable the plaintiff afterwards to bring this action. And it was said, that in a similar action to the present, brought under the like circumstances, before Lord *Kenyon*, his Lordship had ruled in favour of the plaintiff, who thereupon obtained a verdict.

[243]

Park and *Dampier* now shewed cause, and said, That this was an attempt to make the 1st and 4th clauses of the Annuity Act (*a*) the same, which were very distinct. The first enacts, "That a memorial of every deed, bond, instrument, or other assurance, whereby any annuity shall be granted, shall be enrolled in Chancery, otherwise every *such* deed, bond, instrument, or other assurance, shall be null and void." Upon this it has been a question, Whether any other than the particular deed, &c. omitted to be memorialized is avoided? But at any rate, such deed, &c. must be avoided by pleading. For the 4th clause, which alone enables the Court, on motion, to order the deed, bond, &c. to be cancelled, only extends to cases where it shall appear to them that any part of the consideration has been returned; or if given in notes, that such notes were not paid when due, or were cancelled without being first paid; or if any part of the consideration were paid in goods, or were retained by the grantee: neither of which applies to the present case. In *Shove v. Webb*, (*b*) which was the first case where the con-

(*a*) 17 Geo. 3. c. 26.

(*b*) 1 Term Rep. 732.

sideration money was recovered back in consequence of the annuity having been vacated, the deeds were stated to have been set aside in the Court of *C. B.*

Garrow and *Marryat* in support of the rule. The first clause of the Annuity Act goes to avoid the *assurance*, which includes every security for the annuity, for want of a proper memorial. And it has been decided, That where any of the securities are void, all are thereby avoided; as in *Cummins v. Isaac*, (*a*) and *Chawner v. Whaley*. (*b*) The decision of this Court, upon the application of the defendant, was not merely that the judgment should be vacated, but that the annuity itself should be set aside. The defendant then has made his election to vacate the annuity; and having at least withdrawn from the plaintiff *one* of his securities for it, the consideration which was paid for *all* the securities has failed; and, therefore, he is entitled to recover it back.

Lord ELLENBOROUGH, C. J. The argument last urged is very forcible. The plaintiff contracted for one entire assurance, consisting of several securities: and he has a right to have that assurance entire, or to have back his money. The defendant has taken away one of his securities: and, therefore, the consideration for the money has failed. On this ground I think the present action may be sustained: and to be sure the substantial justice of the case is all on the plaintiff's side; though that ought never to be obtained by violating the forms of law; but on the latter ground, I think it may be attained without any such violation.

Per Curiam,

Rule absolute.

(*a*) 3 Term Rep. 133.

(*b*) 3 East, 500.

1805.

SCURFIELD
against
GOWLAND.

[244]

1805.

Monday,
Feb. 11th.CHAMBERS *against* CAULFIELD.

Where husband and wife entered into a deed with trustees, whereby the husband covenanted with the trustees (to whom certain annuities were transferred, one payable to his wife absolutely, & another for so long as she should live with her husband) that they should apply the first, and an equal annuity in lieu of the second to be paid by the husband to the separate use of the wife in case she should live apart from her husband with the approbation of the trustees: and the husband also covenanted in case of

THIS was an action against the Defendant for criminal conversation with the Plaintiff's wife, tried before Lord *Ellenborough*, C. J. at the sittings after the last Term, in which the plaintiff recovered a verdict for 2000*l.* * damages: and on a former day in this term, the Court was moved to set aside the verdict, and grant a new trial on two grounds: 1st, That previous to and at the time of the act of adultery proved, the plaintiff was living in a state of separation from his wife, by virtue of the deed after mentioned; and, therefore, according to the case of *Wcedon v. Timbrell*, (a) the action, which was founded on the loss of comfort and society of the wife, would not lie. 2dly, That the damages were excessive in a case where the husband had before agreed to a separation from his wife.

The deed in question was made in *August*, 1798, between the plaintiff of the first part, the plaintiff's wife of the second part, Lord *Rodney* and *John Rodney* as trustees of the third part, and *J. Milbanke* as another trustee, of the fourth part; and after reciting that Sir *Wm. Chambers* (the plaintiff's father) had devised an annuity of 200*l.* to Mrs. *Chambers*, so long as she continued to live with the plaintiff; or, in case she survived him, *durante viduitate*; and that she was also entitled to a pension of 100*l.* per annum for her life, future differences to permit the wife to live separate from him, if she should on that account find it necessary; and the deed contained a clause, That in case of separation, with the approbation of the trustees, certain of the children should live with and be educated by the wife for a certain period; and that she might visit the others at his house, especially when ill, so as to require the attention of a mother; and it also contained other clauses, providing certain things in case of such separation as aforesaid; held, that such a deed did not preclude the husband from maintaining an action against the defendant for an act of adultery, proved to be committed while the wife was in fact living apart from her husband; for if there were no approbation of the trustees to the separation, which must be taken to be the case, as none was proved, then this was not such a separation as the husband consented to by the deed, according to the true construction of it; and if the separation were with the approbation of the trustees, then the husband not having given up all claim to the comfort, society, and assistance of his wife (for the interests of the children were provided for as well as the separation of the parents during such approbation) the case is not brought within the principle of the decision in *Wcedon v. Timbrell*, allowing that to be law to the extent of the case there decided. The Court are not restrained from granting a new trial in a case of crim. con. for excessive damages, if they are satisfied that the jury acted under the influence of undue motives, or of gross error or misconception on the subject.

* [245]

(a) 5 Term Rep. 357.

granted

granted by the *Irish* parliament; and reciting also, that “divers differences had lately arisen between the plaintiff and his wife, and that the plaintiff, in order to put an end to such differences and to induce his wife to continue to live with him, had agreed to treat her with all due kindness and regard; and to enter into the covenants and agreements after mentioned, subject to the conditions and restrictions therein contained;” witnessed, that in pursuance of the agreement, the plaintiff and his wife assigned and transferred to the trustees the said annuities of 200*l.* and 100*l.* in trust to pay the latter to Mrs. *Chambers* for her separate use absolutely; and as to the annuity of 200*l.* so long as the plaintiff and his wife should live together, in trust to apply the same; or so much of it as the trustees, or survivors or survivor, should in their or in his discretion think necessary, in the purchasing of wearing apparel and other necessities for Mrs. *Chambers*, and the surplus to the plaintiff; and upon further trust, “in case any separation should thereafter take place between the plaintiff and his wife, with the approbation of the said trustees, or the survivors or survivor of them, or of the executors or administrators of such survivor; or in case of the death of the plaintiff in the lifetime of his wife,” the said trustees and the survivor, &c. should apply the whole annuity of 200*l.* in the same manner for the benefit of Mrs. *Chambers*, as was before directed, touching the annuity of 100*l.* Then after several covenants for the securing of the trustees, and for further assurance, the plaintiff covenanted with the trustees, their executors, &c. “that in case future differences shall arise between him and his wife, and his wife should on that account at any time thereafter find it necessary to live separate and apart from him, he would permit and suffer her to leave him; and from time to time, and at all times thereafter, to live and reside separate and apart from him, in such places, or with such families, as she should think proper; and that he would not at any time thereafter prosecute, disturb, or molest her, or any person in whose house or family she should reside or be entertained, for, or in respect of her separate residence and remaining separate from him; subject, nevertheless, to the proviso or condition in that behalf after mentioned.” And he also covenanted, that his wife might take and enjoy to her separate use all such household furniture, clothes, jewels, goods,

1805.

CHAMBERS
against
CAULFIELD.

[246]

1806
 CHAMBERS
 against
 CAULFIELD.

goods, and other personal estate and effects, as then did or thereafter should belong, or be reputed to belong to her, not exceeding 500*l.* in value. And that in case the said annuity of 200*l.* should at any time, during the life of his wife, cease to be payable, he (the plaintiff) should, in lieu thereof, pay to the trustees another annuity of 200*l.* during her life, upon the same trusts as the first-mentioned annuity. "And further, that in case any such separation should take place between him and his wife, with such approbation of the trustees, or the survivor, &c. it should and might be lawful for her to take with her the two younger of her children, by him (the plaintiff) viz. &c. and all such other child or children as she might in the mean time have by him; and to bring up and educate them until they respectively attained the age of eight years, free from and without his interruption, &c. And that in case any such separation should take place, she might at all times thereafter, whenever she thought proper, come to his dwelling-house, or wherever else their other children should be, in order to see such other children; and more especially in case any of them should be ill, so as to require the care and attention of a mother." And further: In case any such separation as aforesaid should take place, he (the plaintiff) should pay to the trustees, &c. so long as his wife should have the care and protection of any of their children, such yearly sum for each such child, as in the judgment and discretion of the trustees, or the survivor or survivors of them, should from time to time be adequate to their maintenance, education, and support. Then followed a covenant by the trustees, that in case the plaintiff and his wife should at any time thereafter live separate, with such approbation as aforesaid, and the plaintiff should keep his covenants, they the trustees would, during such separation, and as long as they received the annuity of 200*l.* &c. indemnify the plaintiff against the debts, &c. of his wife for necessities; with a proviso, "that in case any separation should take place between the plaintiff and his wife, such separation should not prejudice or hinder either party from prosecuting any action or suit, &c. in law or equity, not contrary or repugnant to those presents which either might have prosecuted, in case no such separation had taken place." There were other parts of the deed not material to be stated. This deed was holden to be binding upon the husband,

[248]

husband, in *Lord Rodney v. Chambers*, (a) upon the event of the separation which it provided for. 1805.

Upon granting the rule *nisi*, Lord *Ellenborough*, C. J. desired that the case might be argued upon the general point, Whether the mere fact of a separation between husband and wife, by deed, were such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife? saying, that he did not consider that question as concluded by the decision in *Weedon v. Timbrell*. And afterwards, upon the report of the case, it appeared that the plaintiff and his wife, by whom he had many children, had lived happily together, until his suspicions of the defendant began: after which, there had been differences and occasional separations between them from time to time, until their final separation in consequence of the adultery, which was two or three years after the deed had been entered into, and after they had lived together again; though the evidence went to shew that they were living separate (but no evidence given that it was with the consent of the trustees) at the time of the adultery proved; for previous to his departure from *England* to the *Helder*, upon military service for a few weeks, he had written letters to his wife, soliciting a reconciliation, and pressing her to return to his house; which she did not do till he had departed; and on the plaintiff's return, he found his wife and the defendant there, when the discovery of the adultery was made.

CHAMBERS
against
CAULFIELD.

[249]

Erskine, *Garrow*, and *Scarlett* shewed cause against the rule. The case of *Weedon v. Timbrell* (b) is not founded upon any former precedent in the law, as was acknowledged by Lord *Kenyon*; but he stated that he had nonsuited the plaintiff, thinking that on principle the action would not lie. But all the principles of morality and public policy are the other way. The foundation and continuation of society depend upon the good conduct of the marriage state, and the government of the husband. Separations may take place from causes merely temporary, and which does not preclude the hope of reconciliation, if not interdicted in the mean time by adultery. They may arise from heat of temper, accident, misfortune, and even from wise policy and affec-

(a) East, 283.

(b) 5 Term Rep. 357.

tion;

1806.
 CHAMBERS
 against
 CAULFIELD.

[250]

tion ; as if a marriage were without consent of the wife's father ; and to prevent her disinherison, the husband bind himself by deed to live separate from her, and that she should reside with her father till he were reconciled to the marriage ; in all which cases, it is plain that the husband continues, notwithstanding the separation, to have a deep interest in the fidelity of his wife, and that the crime of the adulterer adds injury to misfortune ; and in all cases the husband must be interested not to have a spurious issue put upon him. The law too considers the interest of husband and wife to be so much the same, and the wife so far to continue under his protection, although living apart from him, that she cannot sue for damages on account of any injuries to herself without the husband being joined. The loss of the comfort, society, and assistance of the wife at the time, cannot be the gist of this action ; for then, though the adultery were before the separation, yet if it were not known to the husband till afterwards, he could not maintain the action : and yet the intrigues of the adulterer may have been the secret cause of the wife's conduct which led to such a separation. Where there are children of the marriage, the adulterer dissolves the tie between them and their mother ; which, of itself, is a loss to the husband independent of her society ; for, after her dishonour, he cannot suffer her to educate his children. Besides, whether the husband lose the whole comfort and assistance of his wife by their separation, must depend upon the cause of it : if it be not for adultery, much comfort and assistance may remain to him, though separated from her correspondence and advice,—from his knowledge of her happiness,—or from considerations of benefit to himself and his children. In actions by a father for the seduction of his daughter, he is put on the footing of a master, and the *per quod servitium amisit* is essential to the action ; but that has never been so considered in the case of a husband, between whom and his wife there is in law a unity of interest. But further : The intent of the deed in this case was not to sever the wife from her husband, but to bring them together again after differences had subsisted between them ; though it does afterwards provide for the event of future separation, if any such necessity should arise : even then, however, he only gives her a qualified licence to live apart from

from him with the approbation of the trustees: and this too holden out as a boon to her, to induce her to live with him again in the first instance. 2dly, On the ground of the damages being excessive, they referred to *Duberley v. Gunning*, (a) to shew that the Court would not interfere in this case, even if they thought that the jury had given too much; which, however, was strenuously denied.

Dallas and *Burroughs*, in support of the rule, contended, 1st, On the authority of *Weedon v. Timbrell*, (b) that the action would not lie upon an act of adultery which took place while the husband and wife were separated by deed. That deed, it is true, provided at the time it was made for the *future* separation of the parties, upon a certain event; but that event having happened prior to the act of adultery, it became a deed absolute, whereby the husband agreed to renounce his marital rights over the person of his wife; which brings this case directly within the authority of *Weedon v. Timbrell*. It was there settled, That the action for criminal conversation is not trespass *vi et armis*, but trespass on the case, in which the special damage is the gist of the action; which is founded solely on the right of the husband to the possession of his wife at the time; and as every such action contains an averment of the loss of the comfort, society, and assistance of the wife, if it appear that such loss was incurred, not by the means of the defendant, but by the previous voluntary renunciation of the plaintiff, the gist of the action fails altogether. It cannot be sustained on the ground of his losing the assistance of his wife in the education of his children, or the management of his house; for this is not an action for the loss of service, like that by a father for the debauching of his daughter, *per quod servitium amisit*; nor is there any such averment in the declaration, or proof at the trial. The loss of *assistance*, as generally averred, can only mean assistance from the act of living together. Then, though the object of the deed were, in the first instance, to bring the plaintiff and his wife together again, yet, it appears from thence, that prior to its execution they were separated on account of differences, of which the plaintiff admits himself, both by the deed itself,

1805.

CHAMBERS
against
CAULFIELD.

[252]

(a) 4 Term Rep. 65.

(b) 5 Term Rep. 357.

1805.
 —
 CHAMBERS
 against
 CAULFIELD.

and his letters which were read in the evidence, to have been the culpable author. In order to induce his wife to continue with him, he covenants to treat her with all due kindness and regard : and in case of future differences between them, " if his wife should on that account find it necessary to live apart from him," he covenants " to permit her to leave him." This leaves her alone to judge of the necessity ; and is independent of the other covenants whereby the *quantum* of her allowance was to depend upon the separation being with the consent of the trustees ; though, if that were material in this case, the Court have already decided (a) that the trustees were entitled to recover on the plaintiff's covenant for separate maintenance.

[253]

[*Lawrence, J.* In that case there was an averment that the separation was with the consent of the trustees. We thought that there was nothing illegal in the parties agreeing to refer the question, What was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court, therefore, only decided in that case, That a covenant for separation and separate maintenance with the consent of the trustees was good, not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased ; for that would be to make the husband tenant as well to the wife of his marital rights.] Supposing a justification were wanting for his wife's withdrawing herself from the plaintiff, it would be found in the cause alluded to in one of his letters, namely, having presented a pistol at her. But independent of this, deeds of separation have existed at all times, and are recognized in the books. The *husband* at least is *sui juris* ; and there is nothing to prevent his consent to abandon his rights. Though even if the deed were bad in law, which the Court will not decide upon a motion for a new trial against the current of authorities, still as the parties were in fact living separate by agreement at the time, the action will not lie.

Curia adv. vult.

LORD ELLENBOROUGH, C. J. now delivered the opinion of the Court. It is unnecessary to say any thing more re-

(a) Lord Rodney v. Chambers, 2 East, 283.

specting the deed of the 18th *August*, 1798, upon this occasion, than that it seems not to have been meant to provide for any separation, but such separation as should take place with the approbation of the trustees; for it assigns to the trustees two annuities (one settled by an Act of the *Irish Parliament* on *Mrs. Chambers* of 100*l. per ann.* the other left to her by the will of *Sir W. Chambers* of 200*l. per ann.* so long as she should live with her husband, or, being his widow, should continue single) first upon trust to apply the 100*l. per ann.* to her separate use, and the 200*l.* a year in the purchase of clothes for her during the time she and her husband should live together; and the surplus to be paid to *Mr. Chambers*. 2dly, In case of a separation, with the approbation of the trustees, and the annuity left by the will of *Sir W. Chambers* ceasing to be payable, to apply the whole of an annuity of 200*l.* to be settled by *Mr. Chambers*, in lieu of the 200*l.* left by *Sir Wm.* in the same manner in which the 100*l.* was to be applied. Then, after some provisions to enable the trustees to receive these annuities, comes the clause which, as is contended, puts it in the power of *Mrs. Chambers*, in case of future differences, to leave her husband, if she should on that account find it necessary to live separate from him; by which *Mr. Chambers* covenants to permit her to live separate and apart from him, and not to prosecute or disturb her or those in whose family she should reside; subject to a proviso in that behalf. “ And also that it shall be lawful for her thenceforth to enjoy to her separate use her household furniture belonging or reputed to belong to her, her clothes, jewels, trinkets, and wearing apparel, to the amount of 500*l.*; and, moreover, in case the annuity of 200*l.* should cease to be payable during her life, to pay to the trustees a like annuity during her life, upon the trusts *before specified respecting the annuity left by the will of Sir Wm. Chambers.* Then follows a clause, that in case of separation with the approbation of the trustees, *Mrs. C.* might take with her the two youngest children, and such other children as she might afterwards have, and educate them until their ages of eight years, and visit the other children at *Mr. Chambers’s* house, especially when ill, so as to require *the attention of a mother.* There is then a provision for certain allowances for the children to be with
Mrs,

1805.

CHAMBERS
against
CAULFIELD.

[254]

1805. Mrs. *Chambers* in case of *such* separation, and a covenant that Mr. *Chambers* should, in the event of *such* separation, cause to be done every other act for her protection and separate residence, and confirming *such* separation. After which comes a covenant by the trustees in favour of Mr. *Chambers*, the husband, which is, in case of a separation *with their approbation*, to indemnify him against all the debts and contracts of Mrs. *Chambers*, and against all suits for diet, washing, lodging, clothes, and other necessaries. Then follows the proviso referred to. Now, taking the whole deed into consideration, it is evident that no separation was in the contemplation of the parties but *with the approbation of the trustees*; for it is a deed in which not only the interests of Mr. and Mrs. *Chambers* are consulted, but also those of their children: and if it were construed as giving her the power to separate without the approbation of the trustees, all the purposes of the deed, except that of their living apart, would be defeated. In the first place, she would have no claim to the annuity of 200*l.* a year; for the trustees have no power to apply that to her separate use, the annuity left by the will of Sir *W. C.* or that which was to be substituted in its room, but in the event of a separation *with approbation*. In the next place the interests of the children would be unprovided for, as she only, in case of a separation *with approbation*, would be entitled to have the care of the younger ones, or to visit the others who might want *the attention of a mother*. And lastly, Mrs. *Chambers*, under such construction, would not have any indemnity against her contracts, which is only provided for in case of a separation with the approbation of the trustees; and not only these consequences will follow from such construction, but also this very absurd one, that if Mrs. *Chambers* left her husband *without* the approbation of the trustees, she would be entitled to take with her personalty to the amount of 500*l.* to which she would not be entitled, if she separated *with* their approbation. If, therefore, the deed, according to its true construction, cannot be holden to have provided for any separation *without* the approbation of the trustees, and we think it cannot, the consequence is, that if Mrs. *Chambers* left her husband *without* the approbation of the trustees (and upon the evidence before us she must be taken so to have done)

CHAMBERS
against
CAULFIELD.

[256]

done) then she was not at the time of the criminal intercourse living separate from him by his consent, and of course the event and situation provided for in the deed has not happened; and in that view of the case, there can be no question but that the plaintiff's right to recover is not affected by this deed: and if she did leave her husband *with* such approbation, the husband has not in this case (as he was holden to have done in the case of *Weedon v. Timbrell*) given up all claim to be derived from her comfort, society, and assistance: the consequence of which is, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms, cannot be considered as an authority against the plaintiff in the present action. As to the second ground upon which the new trial was moved for, viz. That of excessive damages; if it appeared to us from the amount of the damages given as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury; but this does not, upon a review of the whole evidence, appear in the present instance to have been the case.

1805.

CHAMBERS
against
CAULFIELD.

Rule discharged.

1805.

Monday,
Feb. 11th.

DEWEY against Sir ANDREW BAYNTUN, Bart.

One who had a life-interest in a settled estate of his wife (both of whom were aged) of at least 3000*l.* a year, whereof the ultimate reversion on failure of issue male (of which there was none) was in her, and having furniture and pictures, &c. in his mansion of not less than 8000*l.* value, being pressed by his creditors, in pursuance of an agreement with his wife, conveys all that his property to trustees (who had married his two daughters) for the benefit of his wife and daughters, and subject to his wife's future appointment: in consideration whereof, the wife discharged him of above 3000*l.* before raised on the estates principally for his use, and enabled the trustees to raise out of her estate 12,000*l.* more for the benefit of her husband's creditors, but subject to the appointment of him, his executors, &c.; and also covenanted to levy a fine, which was levied a year afterwards; and the husband covenanted to deliver an inventory of the goods to the trustees within six months, which was not done. And after the conveyance, the husband continued to use the furniture, &c. in the house as before; and was soon afterwards sued by several of the creditors, whose executions against such goods were satisfied by him, without setting up the trust-deed, or resorting to the trust-fund; but money was raised on it afterwards, for other creditors; and above two years after the deed, the husband being sued by the plaintiff, a creditor before that time, the trust-deed was set up in bar of the levy upon the goods in the house: and the sheriff returned *nulla bona*. And upon an action brought for a false return; held that in the consideration of the question, Whether this were a *bona fide* transaction, or a contrivance to defeat creditors, and therefore void at common law? or, by the stat. 13 Eliz. c. 5. it is material to submit to the jury the relative value of the property withdrawn from the reach of the creditors in proportion to the amount of their demands at the time, and the value and tangibility of that substituted in its place, in aid of the conclusion that the deed was covenous against them; and, therefore, a verdict for the plaintiff, founded principally on these concomitant circumstances: 1. The previous embarrassment of the husband;—2. The want of notoriety of the conveyance at the time;—3. The want of an inventory:—4. The continuance of the husband's possession, though consistent with the deed, yet without notice of the change of property;—and, 5. The appropriation by the husband of a part of the money raised by the trustees to his own use, without objection, was set aside, and a new trial granted to bring the question more fully before the Court and jury as to the good faith of the transaction, and the value of the consideration, and its availability to the creditors.

THIS was an action by the Plaintiff, as administrator of *Eleanor Dewey*, against the Defendant, sheriff of the county of *Wilts*, for a false return of *nulla bona* (except as to 256*l.* 5*s.*) to a writ of *testatum fieri facias*, sued out by the said *Eleanor* upon a judgment for 2400*l.* and costs recovered by her against Lord *Arundel* of *Wardour*, in which the declaration contained the usual averment, that at the time of the delivery of the writ to the sheriff, and before the return thereof, Lord *Arundel* had goods and chattels within the bailiwick, whereof the sheriff might have levied the debt and damages. Upon not guilty pleaded, the question at the trial before Lord *Ellenborough*, C. J. at the sittings at *Westminster* after last *Trinity* Term was, Whether certain deeds aftermentioned, executed by Lord *Arundel*, before the original action brought, for* conveying to trustees a certain life-estate and the household furniture and pictures in *Wardour Castle*, in trust for his wife Lady *Arundel* and for other purposes, were fraudulent or not? If fraudulent, the action will lay: if valid in point of law, the return of the sheriff was proper.

* [258]

The plaintiff proved the judgment of *Mich. Term*, 43 *G. 3.* in the suit of *Eleanor Dewey*, against Lord *Arundel* for 2400*l.* the writ indorsed on the 9th of *December*, 1802, and delivered to the sheriff on the 12th, the return of *nulla bona* (as to all but 256*l.* 5*s.*) and that there was at that time household furniture and pictures in *Wardour Castle*, where Lord *Arundel*, who appeared as owner, and his family resided and still continue to reside, to the value (as admitted) of above 8000*l.*; but there was no proof of what the actual value was. The debt was of long standing before the deeds in question. On the part of the defendant, the following deeds were given in evidence:—1. The marriage settlement of Lord and Lady *Arundel* in 1764, founded on prior articles, by which it appeared that Lady *Arundel* was seised in fee before marriage of estates to the amount of between 3000*l.* and 4000*l.* *per annum*, which were settled upon her and Lord *Arundel* for their joint lives, and the life of the survivor; remainder to the use of the issue male in tail; remainder to the use of such person or persons as Lady *Arundel* should by deed or will appoint; and in default of appointment, remainder to her own right heirs in fee. 2. Indentures of lease and release, and appointment, dated 28th and 29th *April*, 1800, between Lord and Lady *A.* of the one part, and Lord *Clifford* and Mr. *Arundel* (who had married the two only daughters of Lord and Lady *A.* the only issue of the marriage) of the other part; which, reciting the settlement of 1764, and that the settled estates were liable to a mortgage of 3716*l.* chiefly raised for Lord *A.*'s benefit, and also to the payment of two several sums of 10,000*l.* the marriage portions of the two daughters; and that Lord and Lady *A.* had then no male issue, nor a probability of having any from their advanced age (Lady *A.* then being about 66, and Lord *A.* nearer 70) witnessed that Lady *A.* in pursuance of an agreement between her and Lord *A.* and of the power reserved to her, appointed that the estates should on the death of the survivor of them, and on failure of their issue male, and subject to the before-mentioned charges, remain to the use of Lord *Clifford* and Mr. *Arundel*, their heirs, &c. upon the trusts after mentioned; and Lord and Lady *Arundel* conveyed the estates accordingly to the use of the trustees for a term of 99 years, if

1805.

DEWEY
against
BAYNTUN.

[259]

1805.

DEWEY
against
BAYNTUN.

Lord and Lady A. and the survivor should so long live, upon the trusts thereafter mentioned, and subject thereto, to the several uses limited to the trustees named in the settlement of 1764, and their heirs, for preserving contingent remainders during the life of Lord and Lady A. and the survivor of them, and to their issue male, by way of continuation of the said uses; and when the same should be incapable of taking effect, to the use of Lord Clifford and Mr. Arundel, and their heirs, in trust by sale, or otherwise, out of the said term or the inheritance to raise 12,000*l.* and interest, and pay the same to such person or persons as Lady Arundel should by deed appoint; and in default of such appointment, to her own separate use, and subject thereto, should stand seised of the said term, and the fee to such uses as Lady A. should by deed or will appoint; and in default of such appointment, to Lady A. in fee. This deed also contained a covenant by Lord and Lady Arundel to levy a fine, to the uses thereinbefore expressed (which was levied accordingly in *Tr. 41 Geo. 3.*) 3. An indenture of equal date with the foregoing; viz. 29th April, 1800, between the same parties, which, after reciting the settlement of 1764, and that the estates were liable to the mortgage of 3716*l.* and the portions of the daughters, and that Lord and Lady A. had no male issue, nor a probability of any; recited further, *that Lord Arundel was considerably indebted to several persons; that the sums mentioned to be charged on the estates were raised for the benefit of Lord A. and had been applied by him for his own use, except 2416*l.* for an enclosure of part of the estates; that Lord A. was indebted to the estate of Lady A. in the whole of the said mortgage debt of 3716*l.*; that under the marriage settlement the estates were in default of issue male subject to Lady A.'s sole appointment; that Lord A. was possessed of pictures, jewels, furniture, books, &c. in Wardour Castle, &c. that Lord A.'s creditors were very urgent for the payment of their debts; that it had been agreed between Lord and Lady A. that 12,000*l.* should be charged upon her estates, and applied in discharge of Lord A.'s debts; and that the estates should, in default of issue male inheritable under the settlement of 1764, be settled to the use of their two daughters and their issue, subject to a power for Lady A. to charge the estates*
with

with 3000*l.* and an annuity of 200*l.* and that Lord *A.* should be released from the 3716*l.* which he was indebted to Lady *A.*'s estate; and that in consideration thereof, Lord *A.* should assign to trustees for the separate use of Lady *A.* the said pictures, &c. And also reciting, That, in pursuance and part performance of the said agreement, the last abstracted deed of even date with this had been executed, witnessed, That in further pursuance of the agreement, and in execution of her powers, Lady *A.* did thereby direct and appoint, that Lord *Clifford* and Mr. *Arundel*, their heirs, &c. should *apply* the 12,000*l.* which by the last-mentioned indenture they were directed to raise, in and towards the discharge of such of the debts owing by Lord *A.* as he Lord *A.* his executors and administrators should by any writing or writings under his or their hands direct or appoint; and subject to the levying thereof, should pay the residue of the rents as Lady *A.* should direct; and in default thereof for her separate use; and in case of the death of Lord *A.* then to pay such rents to Lady *A.* during her life; but if Lord *A.* should survive her, then to pay the rents as Lady *A.* should by will, &c. appoint; and in default of such appointment, to Lord *A.* for life; and after the decease of Lord and Lady *A.* and in failure of their issue male inheritable, &c. should convey the estates to the use of their daughters and their children, &c. (subject to the appointment of Lady *A.* by will or deed); and in default of such appointment, in moieties to the two daughters in strict settlement; remainder to the right heirs of Lady *Arundel*. Then followed a declaration, discharging Lord *A.* from any claim from the estate of Lady *A.* in respect of the money so to be raised, and a power to Lady *A.* to charge the estates with the further sum of 3000*l.* and the annuity of 200*l.*; and in consideration thereof, Lord *A.* conveyed to Lord *Clifford* and Mr. *Arundel* all the paintings, &c. statues, plate, jewels, china, glass, fixtures, linen, furniture, &c. books, &c. and implements of household and husbandry in and about his mansion of *Wardour Castle*, &c. in trust for such person and for such intents as Lady *A.* should appoint; and until then, in trust for Lady *Arundel*'s separate use, not subject to the debts or control of Lord *A.*: and in default of her appointment the trustees were after her death

to

1803.

DEWEY
against
BAYNTUN.

[261]

1805.

DEWEY
against
BAYNTUN.

[262]

to assign the same to the persons who would be entitled thereto under the statute of distributions, if Lady *A.* had survived Lord *A.* This deed also contained a covenant by Lord *A.* within six months, to make an inventory of the articles, and to deliver a copy to the trustees. No inventory, however, appeared to have been taken till *November*, 1803, which was after the plaintiff's execution had come in. The execution of the deeds of *April*, 1800, was proved by Lord *Arundel's* general steward; who said, on cross examination, that Lord *A.* for two or three years before *April*, 1800, was in embarrassed circumstances, and his creditors very urgent. That he, the witness, was not made acquainted with the contents of the deeds at the time of their execution. That the first execution at *Wardour Castle*, was brought in in *July*, 1800, for 1271*l.* &c. at the suit of another creditor, when the trust-deed was shewn to the under-sheriff; but the debt being shortly after paid by the witness with Lord *Arundel's* money, that execution was withdrawn without any inventory having been taken by the sheriff. In that year, and in 1801, several other executions came in, which were satisfied in general by money of Lord *Arundel's*, paid by the witness. In one or two instances, however, levies were made of farming stock, wine, and other articles not included in the trust-deed. Altogether debts were satisfied to the amount of above 4000*l.* The judgment in question was obtained in *Michaelmas*, 1802. This witness also said, in answer to a question by the Court, that he did not know of any notice having been given to the trustees of these executions. Another witness, the house steward, proved that he had received the trust-deed from Lady *Arundel* about the end of *June*, 1800, and a paper signed by the trustees, authorizing him to keep possession of the goods comprised in that deed on their account; but no inventory was taken to his knowledge of the goods. A clerk of the conveyancer next proved that he was present at the execution of the deeds, and immediately after drew the order from the trustees to keep possession, which he sent to Lord *Clifford* in *Devonshire* for his signature; and on its return delivered it to the house steward, with directions to shew the sheriff the deed if he came. The solicitor to Lord *Arundel* and to the trustees, then proved that he was not concerned

[263]

concerned in his lordship's affairs till the *February* preceeding the execution of the deeds; that he had not been consulted, and knew nothing of the deeds till *June* or *July*, 1800, when he immediately gave notice of them to the sheriff, and made them as public as possible. The value of the estates comprised in the deeds were proved to be about 3000*l.* *per annum*. It appeared that a mortgage for above 5000*l.* had been executed by the trustees under the trust-deed to Mr. *Vanderclooster*, who had sent an execution into *Wardour Castle* in the year 1801, which was afterwards withdrawn. (a) There was also proof of another sum of 2000*l.* having been raised under the trust-deed, of which above 500*l.* came into the hands of Lord *Arundel* himself; and it did not appear how it had been applied by him. The remainder of it was applied in discharge of Lord *A*'s debts; but it did not appear that any payment had been made till after the action brought.

Lord *Ellenborough* left the question to the jury upon this evidence, Whether the trust-deeds were a contrivance to defeat Lord *Arundel*'s creditors, and void under the stat. 13 *Eliz. c. 5.*? or, Whether they were a *bona fide* transaction, according to the distinction taken in the case of *Cadogan v. Kennet*? (b) and observed upon the several circumstances of dissimilarity between the two cases. His lordship pointed out to the jury the circumstances of the concealment of the contents of the deed of 29th *April*, 1800, and of the non-existence of an inventory, which, if Lady *Arundel*'s protection had been the object in view, ought to have been taken; but he left it to them upon the whole to say *quo animo* that deed was executed; whether substantially for the protection of Lady *Arundel*, who had purchased the goods for the consideration therein stated; or whether in truth it was intended for the protection of Lord *Arundel*'s property from his creditors. The jury being of opinion that the deeds were fraudulent, found a verdict for the plaintiff.

In *Michaelmas* Term last a rule *nisi* was obtained for setting aside the verdict and for a new trial, on the grounds, 1st, That the sale was *bona fide* and valid at common law,

(a) *Quere* as to another sum of 2000*l.* raised.

(b) *Cowp.* 432.

and

1805.

DEWEY
against
BAYNTUN.

[264]

1805.
 ———
 DEWEY
against
 BAYNTUN.

and not within the prohibition of the stat. 13 *Eliz. c. 5.* 2dly, That there was a full and fair consideration for the deed of the 29th of *April*, 1800; whereby Lord *Arundel* conveyed the property in question to Lady *A.*'s trustees: and that neither the present embarrassment of Lord *Arundel*, nor the want of notoriety of the execution of the deeds, nor the neglect of having an inventory of the goods, nor the fact of Lord *Arundel*'s continuing in the use and enjoyment of the goods after the conveyance, nor the subsequent appropriation to his use of part of the trust-money raised under the deeds, were either singly or collectively sufficient badges of fraud to avoid the conveyance.

[265]

Garrow, *Park*, and *Wigley* shewed cause in the same Term; and after premising that no objection was made to the direction of the Lord C. J. at the trial in point of law, nor that the question of fraud was properly determinable by the jury, they contended that there was sufficient evidence of fraud to warrant the conclusion which they had drawn. The true question is, Whether the deeds were executed *bona fide*, and for a sufficient valuable consideration, for the purpose of creating an available fund for the payment of Lord *Arundel*'s creditors? or, Whether they were illusory, and a mere contrivance to put his effects out of the reach of his general creditors for an unavailable or inadequate consideration? This question was properly left to the jury in the terms used by Lord *Mansfield* in *Cadogan v. Kennet*; (a) and in drawing a conclusion of fraud, all parts of the transaction are to be taken together, and the *corpus delicti* may be inferred from the whole, though each fact taken separately might not warrant the conclusion. 1st, The consideration for the conveyance was inadequate, and contrived for the purpose of diminishing the funds of Lord *A.* which were before amenable to the execution of his creditors. It was made *after* marriage, and not *before*, as in *Cadogan v. Kennet*, *Jarman v. Woollofton*, (b) and *Haselington v. Gill*; (c) in which latter case Lord *Mansfield* said, That a conveyance after marriage (*i. e.* to trustees for the benefit of the donor's wife) is totally void as against creditors, for want of consideration. Lord *Arundel* gave up his life interest in

(a) Cowp. 432.

(b) 3 Term Rep. 613.

(c) 3 Term 620, note.

an estate of at least 3000*l.* a year; which at six years' purchase was worth 18,000*l.*: and all his furniture, pictures, &c. in *Wardour Castle*, admitted to be worth not less than 8000*l.* more, and probably a much greater sum, if a proper valuation had been made, as is recommended to be done in *Twyne's* case; (a) and all this in consideration only of 12,000*l.* which was to be raised by the trustees for the benefit of the creditors; and of 1300*l.* for which he was before indebted to the settled estates. *Prima facie*, therefore, the consideration for the conveyance by Lord *A.* was very inadequate; and at least called upon the defendant, who is indemnified by the trustees, and must defend himself upon their title, to shew either that the 12,000*l.* was sufficient for the discharge of all Lord *A.*'s creditors; or that he had other property out of settlement and unincumbered, sufficient for that purpose. As the case stands at present, there seems to have been no good reason for including the personal property in the conveyance, as there was in *Cadogan v. Kemet*, where the realty was found not to be sufficient of itself or the purpose of the settlement; but the only object in doing so here, seems to have been to dispossess Lord *A.* of all his visible property, in order to preserve it from his creditors. But further: Even supposing that 12000*l.* would have been a good consideration for the conveyance, as against creditors, if it had been an available fund for them to resort to, yet it was not so; for it depends upon the appointment of Lord *A.* who may appoint the whole to some favourite creditors, leaving the rest without remedy, as is attempted to be done with respect to the present plaintiff. No time is limited for his appointment: and there is no instance of the Court of Chancery compelling the execution of such a power in favour of any particular creditor; for that would be to defeat the preference, which it was one object of the power to secure. The power too is only to be exercised by Lord *A.* personally; and in case of his death it does not appear that the trustees could be compelled to raise and distribute the money. But supposing that Court could compel Lord *A.* to appoint, or the trustees, after his death, to distribute the money amongst the creditors, at any rate,

1805.

DEWEY
against
BAYNTUN.

[266]

(a) 3 Rep. 81.

1805.

DEWEY
against
BAYNTUN.

it would only be done by giving notice to all the creditors to come in, and by dividing the fund amongst them in rateable proportions; which would necessarily delay each particular creditor, and put him in a worse situation than if he could help himself at once, by using due diligence at common law. There was therefore no adequate consideration, with respect to creditors, for the property conveyed by Lord *A.* to the trustees. 2dly, Such a deed, which would be considered as fraudulent and void, and an act of bankruptcy in a trader, within the bankrupt laws, is also void within the stat. 13 *Eliz. c. 5.* being made to delay or defraud creditors of their just debts. It was said indeed, That Lord *A.* might have sold his property to any person, and converted the money to his own use; and if so, the trustees of Lady *A.* had as good right to be purchasers, for a valuable consideration, as any other: but if a vendee know of the purpose and purchase for the sake of aiding the debtor to defeat creditors, the sale is void, and no property passes as against them; for a sale to be binding must be *bona fide*, as well as on good consideration, in order to bring it within the proviso of the 6th section of the Act, according to *Twyne's case*, (a) *Cadogan v. Kennet*. (b) In *Russell v. Hammond*, (c) where the father being largely indebted at the time, settled certain leasehold estates upon his son and his son's wife, in consideration of the marriage already had, and a certain sum paid, reserving an annuity to himself and his wife for life, tantamount to the value of the rents,—this was holden to be clearly void, as against creditors within the statute. Then the badges of fraud in this case are many and strong:—

[268] 1st, The previous embarrassment of Lord *A.* admitted by the very deed of the 29th of *April*, 1800, which recites the urgency of his creditors, and proved by the frequent executions against his property about that period: and though there were no existing suit of any creditor at the time of the conveyance executed, as in *Twyne's case*, yet it is sufficient that there were co-existing *debts*, which it was the object of the conveyance to delay or defeat; which brings the case equally within the words and meaning of the statute. In *Russell v. Hammond*, Lord *Hardwicke*, said, That “ he had

(a) 3 Rep. 81.

(b) Cowp. 434.

(c) 1 Atk. 13, 16.

hardly known one case where the person conveying was indebted at the time of the conveyance, that had not been deemed fraudulent." (a) 2dly, The secrecy of the conveyance at the time, and the subsequent want of notoriety, are strong badges of fraud, according to *Twyne's* case. The deeds were prepared at *Wardour Castle*, by the clerk of the conveyancer, without the knowledge of Lord *A.*'s own solicitor; and they continued unknown to all the confidential domestics until after an execution had come in at the suit of another creditor. The circumstance of its being done by two deeds of even date, one of which only shewed the true nature of the transaction, when it might have been comprized in one deed, is suspicious; and seems intended to conceal the transaction as much as possible. If the conveyance had been meant to be made *bona fide* and for an adequate consideration, a meeting of the creditors would have been convened, or some notice given to them, that such a fund had been set apart for them; but no creditor was consulted, and no notice given, nor even any list of creditors prepared or communicated to the trustees, nor any inquiry made about them. It does not even appear that the trustees themselves were previously required to undertake the trust, nor that any person, on the behalf either of them or of Lady *A.* attended to the framing of the deed, which was to secure her interest in opposition to that of her lord: and so little interest did the trustees take in the conveyance, that, after the executions came into the house and their claim was brought forward, the preservation of the property in the house was confided by them to one of Lord *A.*'s domestics, who was under his controul. This differs the case materially from *Cadogan v. Kennet*, (b) where the deed of conveyance was settled by a Master in Chancery, and there was no secrecy. 3dly, The want of an inventory of the goods is another strong badge of fraud; without which it could not be certified to any creditor what goods were comprized in the deed. The necessity of this is strongly recommended in *Twyne's* case; (c) and in *Cadogan v. Kennet* there was an inventory: and though it was said by Lord *Kenyon*, in *Jarman v. Wool-*

1805
 DEWEY
 against
 BAYNTON.

[269]

(a) Lord Hardwicke delivered an opinion to the same effect in *Lord Townsend v. Windham*, 2 Ves. 11.

(b) Cowp. 432.

(c) 3 Rep. 81.

1805.

DEWEY
against
BAYNTUN.

[270]

loton, (a) That Lord *Mansfield* would not probably have differed from the conclusion which he drew if there had been an inventory yet that was said with reference to a case of settlement *before* marriage, and where there was no clause that there should be an inventory; and yet where the fairness of the transaction was so much the stronger evinced, by the parties having, before any question arose in fact, lodged a catalogue in the hands of the trustees of all the settled goods, excepting only the stock in trade, which it was nugatory to do from the fluctuating nature of it. There, however, the jury found that the deed was fraudulent as to such stock, the husband having joined in carrying on the trade: so in *Haselington v. Gill*, (b) though the property settled on the wife before marriage, consisting of stock in trade, could not be scheduled, and stock purchased afterwards with the produce of the settled property was protected by the settlement, yet it appears from what was said in the argument of *Jarman v. Woolloton*, where that was cited (which was not denied), That the trade was carried on in another place, distinct from the husband. 4thly, Though Lord *A.*'s continuing to have the same possession and use of the furniture, &c. after the conveyance as before, was consistent with the deed, and therefore not fraudulent in itself, yet it made it more necessary to give notice of the change of property, and to have an inventory of the furniture, &c. so conveyed; and none such having been given or made at the time, affords another ground of suspicion that the conveyance was never meant to be acted upon, unless to defeat the suits of creditors. 5thly, The same inference arises from the trustees having paid over the money raised by them for the purposes of the trust in Lord *A.*'s own hands, trusting to him for the application of it, and from their having suffered him to appropriate part of it to his own use: and though they might thereby have rendered

(a) 3 Term Rep. 622.

(b) 3 Term Rep. 620, *n.* It was observed at the bar, That Mr Justice Buller, in *Edwards v. Harben*, 2 Term Rep. 597, says, in *Haselington v. Gill*, That the cows purchased after the marriage might be taken in execution, to satisfy the husband's debts: but it does not appear by the note in 3 Term Rep. 620, the accuracy of which I cannot doubt, that the Court so decided. On the contrary, it appears that they held expressly, That the cows purchased by the wife after the marriage, with the produce of the cows settled before marriage, were equally protected by the settlement.

them-

themselves personally liable to the creditors, yet their act was evidence, to shew that they considered themselves to be acting under his controul, and not under an adverse deed of trust. At all events, it was a question of fact for the jury, under all the circumstances, Whether the conveyance were fraudulent or not ?

Erskine, Gibbs, Dillon, and Richardson, in support of the rule. The question is, Whether the property were well conveyed to the trustees at the time ? or, Whether the conveyance were fraudulent and void, either at common law, or by the stat. 13 *Eliz. c. 5* ? which depends upon this, Whether, the deed of the 29th of *April*, 1800, were made *bona fide* and upon good consideration ? A conveyance may be avoided by two sorts of fraud :—One where nothing is intended to be conveyed ; but only the mere form or appearance of a deed is held out to the world, affecting to change the property, accompanied with a secret trust or defeazance, which renders it of no effect after the purpose has been answered ; and this is in truth a mere trick or contrivance, in the terms of the question left to the jury in this case. The other is, where the deed is really meant to pass, and does actually pass the property to another ; but it is given under such circumstances as avoids the effect of it, with respect to creditors under the statute of *Elizabeth*. Of the former kind of fraud, there was no evidence whatever to justify the verdict ; and it is probable that the jury came to their conclusion upon a misapprehension of the law for the fact ; considering that the delay of the creditor, which is an ingredient to bring a case within the stat. 13 *Eliz. c. 5*. made the deed fraudulent in fact, without adverting to the distinction above noticed, and to the other circumstances of the case, which take the deed in question out of the statute. In order to justify the conclusion of fraud in fact, the jury should have been persuaded that Lord *A.* never meant to give up his life interest in the estate, or the furniture, &c. in his house to the trustees for Lady *A.* ; and that the latter never meant to charge her reversion with the raising the 12,000*l.* for the creditors ; but that the money either was not meant to be raised at all ; or, if raised, was meant to be repaid to her ; although in fact a considerable part of it was raised and applied by the trustees in payment of debts,—and that too, before this action was brought ; and, no doubt, they are compellable

1805.

DEWEY
against
BAYNTUN.
[271]

[272]

1805.

DEWEY
against
BAYNTUN.

pellable to raise the remainder, and would be holden responsible in equity for any misapplication of it. There can be no collusion then in this case: the consideration is in the deeds; the estates are conveyed to third persons; the parties cannot be placed in *statu quo*; the benefit of the consideration does not remain in Lord *A.* who has conveyed. It could not have been intended at the time that Lady *A.* or her trustees should take secretly for the benefit of Lord *A.* It would have defeated the whole object of the trust, which was to secure the property for Lady *A.* and her daughters; and the trustees are the husbands of those daughters, who are to be benefited by it. The *evidentia rei* is decisive upon this part of the subject. The fine indeed was not levied till a year after the covenant; but it could not be part of the fraud meditated that Lady *A.* should die in the mean time; though if she had, equity would have supplied a fine upon the covenant to levy one. At all events, the deed is valid and binding upon the face of it; and the proof of fraud lies upon the party who would avoid it. A conveyance, however, though real, and even made for good and meritorious consideration, may still be fraudulent in law, if made maliciously and with design to defeat creditors; but it is not enough to bring a conveyance within the statute, that its effect is to delay or hinder a creditor if it be made *bona fide* as well as upon good consideration, according to *Cadogan v. Kennet* (a) and *Meux v. Howell*. (b) This is a species of fraud distinct from the other; but none of the *indicia* of fraud relied on are sufficient to bring this case within the statute, nor will any of the decided cases warrant it. *Twyne's* case, (c) which is the leading one, is very distinguishable; for there the conveyance was made pending the writ, and the donor continued afterwards in possession of the goods which the deed professed to have conveyed to another; and none of the cases go further: but here there was no writ pending at the time of the conveyance; and the possession of Lord *A.* afterwards was consistent with the deed. Besides which, the deed, while it operated to withdraw out of the reach of the creditors that which was before amenable to their process, at the same time substituted something which was at

[273]

(a) Cowp. 432.

(b) 4 East, 1.

(c) 3 Rep. 80.

least as beneficial to them. This brings it to the second and principal objection made, The want of an adequate and available consideration for the deed of the 29th of April; in order to establish which, it must be shewn that the consideration was so clearly inadequate to the value of the property conveyed, that fraud must have been intended; for there are many authorities to shew, that in cases of this kind, if the transaction be *bona fide*, the Court will not weigh the adequacy of the consideration in nice scales. *Scot v. Bell*, (a) *Brown v. Jones*, (b) *Doe v. Routledge*, (c) and *Nunn v. Wilsmore*. (d) Now, besides the 12,000*l.* which Lord *A.* was to appoint amongst the creditors, and part of 3716*l.* which had been before raised by mortgage, principally for his benefit, and for which Lady *A.*'s estate was a creditor, there was a further consideration moving to Lord *A.* which was the settlement of his wife's reversion on his daughters, in default of issue male: he was therefore a purchaser of that reversion for his daughters. In return for all this, Lord *A.* conveyed his own life estate in 3000*l.* a year, landed property, which, at nearly 70 years of age, could not be very valuable; and his furniture, &c. in *Wardour Castle*, worth about 8000*l.* This then was at least a sufficient consideration to rebut the implication of fraud from want of consideration. In addition to which, it may be observed, That if Lord *A.*'s life-estate had not been conveyed to the trustees, it would not have been easy for them to have raised money on the reversion: but at all events, it is sufficient as to the new trial to say, That the case never went to the jury upon the ground of inadequacy of consideration. It is then objected, That the fund of 12,000*l.* set apart for the creditors, is made subject to Lord *A.*'s appointment, who may prefer some in exclusion to others: but that is no other than the same power which the law gave him before over his own property. At common law, any debtor might dispose of his effects at any time before execution, although his object in so doing was to squander the money and defeat his creditors; and such disposition would have bound them, provided it were real, and not rendered nugatory by a secret trust for his own benefit. Hence the necessity of the stat. 29 *Car. c. 3. s. 15*,

1805.

DEWEY
against
BAYNTUN.

Want of con-
sideration for
the deed of
29th April,
1800.

[274]

(a) 2 Lev. 70.

(b) 1 Atk. 188—190.

(c) Cowp. 705.

(d) 8 Term Rep. 529.

1805.
 —
 DEWEY
 against
 BAYNTUN.
 [275]

16. which binds lands from the day of the judgment, but goods only from the delivery of the writ to the sheriff. At the time, therefore, of the execution of the deed of the 29th of April, 1800, Lord A. might have sold his life-estate and his goods at *Wardour Castle*; and have spent the money, or invested it in copyhold estates, or in the stocks, out of the reach of his creditors; and the sale could not have been set aside under the stat. 13 *Eliz. c. 5.* unless shewn to have been malicious and fraudulent on the part of the vendor and purchaser, in order to disappoint a particular creditor of his debt, of which there is no evidence in the case: but a bare knowledge that the seller is in debt will not avoid the sale: and Lady A.'s trustees had as much right to purchase as any other; more especially too when it appears that the very object of their purchase was to secure the purchase-money, which might otherwise have been squandered, for the benefit of the creditors. The purchase therefore by the trustees was more beneficial for the creditors: for it gave them a certain fund which could not be alienated or diverted, in lieu of one which was uncertain and fluctuating; and that consideration alone would compensate some diminution of the value and some additional delay in the payment. In *Estwick v. Caillaud*, (a) where one, by deed, conveyed real and personal property to a trustee, in trust to pay half the amount to the grantor for his own use, and the residue amongst certain creditors named in a schedule, without any intention of fraudulently delaying another creditor not named therein,—held that the conveyance was good: but further, It is not to be presumed that Lord A. will be so unjust and perverse as not to make an appointment, or to make a partial one; [276] though, if it were, the plaintiff is not without remedy. The distinction which runs through the cases in Chancery, is, That where one has a voluntary power of appointment amongst several, a court of equity cannot compel him to exercise it in his lifetime: because there is no particular person who can claim the execution of it in his own favour,

(a) 5 Term Rep. 420. Lord Kenyon there said, That “ as it did not appear that it was a conveyance of the whole of Lord Abingdon's property, the case was delivered from the objection, that the deed was fraudulent; because it was only intended as a provision for some of the creditors, in exclusion of the rest.”

each object of the appointment being a volunteer; but where there is a power of appointment, coupled with a trust and a present interest in the objects of the appointment, it is otherwise. *Lassells v. Lord Cornwallis*, (a) *Lord Townshend v. Windham*, (b) and *Brown v. Higgs*. (c) Now this was not a naked power in Lord A. which he might or might not execute, but a vested interest in the trustees, for the benefit of the creditors, subject to Lord A.'s direction as to the distribution, which he was bound in conscience to give fairly and without delay when called upon; and which therefore the Court of Chancery would compel him to do. Lord A. was only to marshal, as it were, the assets; but he cannot, by refusing to appoint, defeat the trust altogether. There is nothing reserved to him, but the same power which he had at common law of preferring one creditor to another where he legally might; and he is now subject to the controul of equity, as he was before of law. In *Hockley v. Maubey*, (d) in case of a devise to A. and his issue, to be divided amongst them as he should think fit, the Lord Chancellor held, That the issue had an interest at all events, and A. had no authority but as to the proportions; and that in default of appointment it would go equally: but at any rate, there are authorities to shew, that, in case of his death, without appointment, or having made an improper one, the trust fund would be considered as assets, liable to the payment of his debts, particularly where the power extends in terms to his executors, &c. *Thompson v. Towne*, (e) *Lassells v. Lord Cornwallis*, (f) *Davy v. Hooper*, (g) *Pack v. Bathurst*, (h) *Mudoc v. Jackson*, (i) and *George v. Milbanke*. (k) Then if equity will supply an appointment, neglected to be made in favour of children, much more will it supply it in favour of creditors. The plaintiff may file a bill against Lord A. and the trustees, stating the circumstances of the deeds, and that a trust was created for the benefit of creditors, subject to Lord A.'s preference by appointment, as he had before; and praying that the trustees may be decreed to raise the money; and that the money, when raised, should be for the benefit of the creditors, or such as should apply to come

1805.

DEWEY
against
BAYNTUN.

[277]

(a) 2 Vern. 465.

(b) 2 Vez. 1.

(c) 8 Vez. jun. 570.

(d) 1 Vez. jun. 143, 150.

(e) 2 Vern. 319.

(f) Ibid. 465.

(g) Ibid. 665.

(h) 3 Atk. 269.

(i) 2 Bro. Chan. Rep. 588.

(k) 1 Vez. jun. 190, N. S.

1805.

DEWEY
against
BAYNTUN.

[278]

in; and that Lord *A.* should appoint accordingly, or, in default of his appointment, that the Court would proceed to distribute the fund rateably amongst them. By this, no rule of law would be infringed, nor any person's property taken from him but by lawful process, and by the ordinary power of Chancery exercised to compel the execution of trusts; but whatever difficulty may arise to the creditors in consequence of the fund being placed at the disposal of Lord *A.* it cannot be greater, nor so great as if the purchase money had at once been paid into his hands; and provided Lady *A.* has *bona fide* paid a valuable consideration for the conveyance to her trustees from Lord *A.* it cannot affect her how the money is afterwards disposed of by him, or whether it be disposed of at all; the consideration has equally passed from her, and she cannot recall it. Part of the 12,000*l.* has been actually raised, and appropriated pursuant to the trust; and even if the residue were unappointed, it would not revert to Lady *A.*, but would fall into the reversion, for the benefit of the two daughters of the marriage, for whom Lord *A.* is a purchaser for a valuable consideration. Then the transaction being *bona fide*, and the consideration sufficient and available, the *indicia* of fraud relied on, as accompanying the transaction, are not of weight sufficient to warrant the verdict. 1st, As to the previous embarrassment of Lord *A.* and the urgency of his creditors at the time, the very mention of it on the face of the deed, shews that no fraud was intended, but that the real object was to raise a fund for the benefit of the creditors; and the circumstance of subsequent executions having been satisfied with Lord *A.*'s own money, instead of sheltering himself under the trust deed, is decisive of the honesty of his intentions, and that that deed was not framed with a view to defeat the creditors; for then he would have availed himself of it in the first instance. 2dly, As to the want of notoriety of the conveyance, the stat. of *Eliz.* does not require it; and in *Lady Griffin v. Stanhope* (a) the mere concealment of a deed, otherwise good, was holden not to vitiate it. There was no necessity for more publicity in this case; family-deeds are not usually made public; the object was to provide a fund in time to answer the demands of the creditors as they were brought forwards. Several were satisfied without resorting

(a) Cro. Jac. 454.

to it, and others by application to it, and the remainder of it is available for the rest. Then as to the two deeds; admitting that the matter might have been comprized in one, the prolixity of the conveyancer is no badge of fraud: but there was a real utility in the conciseness of the first deed; for that was to be the title of the mortgagee, who would not like to have it embarrassed with the family reasons for making it. 3dly, As to the want of an inventory, though an improper omission, it only subjected the trustees, claiming under the deed, to greater difficulty in proving their property to be distinct from Lord A.'s; which is all in favour of a creditor claiming under an execution against him: and, according to *Jarman v. Woolloton*, (a) the want of an inventory is not sufficient to avoid a deed of this kind. Here, however, the deed provides that an inventory shall be made by Lord A. within six months; and his neglect to do so cannot prejudice Lady A. 4thly, Lord A.'s continuing in possession of the goods after the conveyance, being consistent with the deed, the object of which was to secure the furniture for the use of Lady A. which she could only enjoy by its continuance in the house where she resided with her husband, is clearly no objection, according to all the authorities. Then, 5thly, The misapplication of 500*l.* of the trust money paid by the trustees into Lord A.'s hands, after the execution of the deeds, cannot by relation back affect their validity at the time; but the trustees are personally answerable for the amount. Upon the whole, therefore, there is neither fraud in fact nor in law; and the verdict must have been founded upon a misapprehension of the jury, as to the effect of a deed, which did in fact delay a creditor, being a fraud in law.

The case stood over till this term; when

LORD ELLENBOROUGH, C. J. delivered the opinion of the Court.

The question in this case was, Whether the trust assignment of the 28th and 29th of *April*, 1800, made by Lord *Arundel* to trustees for his wife, upon the considerations in the deeds of that date mentioned, were fraudulent and void? Upon which question depended, Whether the return of *nulla bona*, made by the sheriff to the plaintiff's execution against Lord *Arundel*, were or were not a false return? The

1805.

DEWEY
against
BAYNTUN.

[279]

[280]

(a) 3 Term Rep. 613.

1805.

DEWEY
against
BAYNTUN.

more fully than was done on the last trial the state and amount of Lord *Arundel's* debts at the time when the assignment in question was executed, we think there should be a new trial in this case.

Rule absolute.

Monday,
Feb. 11th.

FLETCHER against WILKINS and Three Others.

Replevin is not an action within the stat. 24 G. 1. c. 44. s. 6, which protects constables, &c. (and amongst other parish-officers distraining for a poor's rate) acting under a magistrate's warrant from any action, until demand made or left at their usual place of abode, &c. by the party intending to bring such action, &c.

TO an action of replevin for taking the Plaintiff's cattle, and unjustly detaining the same against sureties and pledges until, &c. the Defendants by their plea avowed and made cognizance of the taking: two of them as overseers of the poor; a third as churchwarden of the hamlet of *Milton*, in the parish of *Shipton*, in the county of *Oxford*; and the fourth as their bailiff, under a warrant of distress of two magistrates made and issued on the 21st of *July*, 1802, for levying 34*l.* 13*s.* 5½*d.* due from the plaintiff upon a poor-rate duly made and published for the said hamlet; and which rate the plea stated that the plaintiff had before the issuing of the warrant been duly summoned before them to shew cause why he should not pay, and had shewn no sufficient cause; by which warrant the said justices had commanded the churchwarden and overseers of the poor of the said hamlet forthwith to distrain the goods of the plaintiff; and that if within six days next after such distress, the said sum with charges, &c. should not be paid, then they should sell the said goods so distrained; and out of the money arising therefrom, detain the said 34*l.* 13*s.* 5½*d.* and charges, &c. rendering to the plaintiff the overplus, &c. The plea then proceeded to state the delivery of the warrant to the churchwarden and overseers of the poor, defendants, to be executed; that they required the plaintiff to pay the sum due under the rate; and because he refused so to do, they, as such churchwarden and overseers, and the other defendant as their bailiff and by their command, acknowledged taking the plaintiff's cattle, &c. as for a distress, &c. And the plea concluded with an averment, 'That no demand of the perusal or copy of the said warrant was ever made or left at the usual place of abode of either of the defendants by the plaintiff, or his attorney or agent, in writing, as by the statute in such case made is directed.' To this the plaintiff pleaded a frivolous plea in bar, denying that at the time of making

making the said warrant of distress there was any such rate, &c. approved by the justices, &c. as in the said warrant is mentioned, &c. To which there was a demurrer, assigning for special cause that the plaintiff had not answered to that part of the said avowry and cognizance in which it is alleged, 'That no demand was made of the perusal and copy of the said warrant therein mentioned; but had by his plea admitted, that no such demand was made.'

1805.

FLETCHER
against
WILKINS.

Joinder in demurrer.

This case was very elaborately and ably argued by *Abbot* for the defendants, and *W. E. Taunton* for the plaintiff; but the same point having been twice before discussed in cases reported, and the Court having adverted in giving their judgment to the principal arguments urged at the bar, it is unnecessary to state them here. After time taken to reconsider the conflicting authorities,

Lord ELLENBOROUGH, C. J. delivered the unanimous judgment of the Court.

This was an action of replevin against four defendants, in which the two first defendants avow as overseers of the poor of the hamlet of *Milton*, in the parish of *Shipton*, in the county of *Oxford*; the third, as churchwarden of the same hamlet; and the fourth defendant, as their bailiff, makes cognizance for taking the plaintiff's cows under the warrant of two justices of peace for levying by distress upon the goods and chattles of the plaintiff a poor's rate, after the same had been duly demanded. The defendants conclude their avowry and cognizance by averring, that no demand of the perusal or copy of the warrant was ever made upon or left at the usual place of abode of the defendants by the plaintiff, or his attorney, or agent, as required by the statute; and pray judgment and a return of the cows, &c. To which avowry there is a frivolous plea in bar, and a demurrer thereto; assigning for cause, that the plaintiff has not by his plea to the avowry and cognizance in any manner answered that part thereof in which it is alleged, 'That no demand was made of the perusal and copy of the warrant therein mentioned;' but hath by his said plea admitted, that no such demand was made. To this there is a joinder in demurrer; and the question arising upon these pleadings is, Whether the stat. 24 *Geo. 2, c. 44, s. 6* (which provides that no action shall be brought against any constable

[285]

1805.
 —
 FLETCHER
 against
 WILKINS.

286]

stable or other officer for any thing done in obedience to the warrant of a justice until demand shall have been made, in the manner prescribed by that act, of the perusal and copy of such warrant; and the same hath been refused or neglected for the space of six days after such demand) extend to the action of replevin? The cases upon this subject are *Milward and Caffin*, 2 Sir W. Blackstone's Rep. 1330; in which case the Court determined that the action of replevin was "an action *in rem* to which that statute had been never holden to extend;" and *Pearson v. Roberts*, Willes's Rep. 668; in which it was decided that an action of replevin could not be maintained against persons making a distress for not performing the highway duty, as a demand had not, previous to the commencement thereof, been made of the justices's warrant. And Lord C. J. Willes there distinguished between a replevin by plaint or mandatory writ to the sheriff, to have the goods again, which he stated not to be within the statute, and replevin by action to recover damages; and, in addition to this, there is the authority of an *obiter dictum* of Lord Kenyon in *Harpur v. Carr*, 7 Term Rep. 270, (a) that but for the case of *Milward and Caffin* he should have thought replevin within the statute: and one cannot but feel the force of the observation made by Lord Kenyon on that occasion, "That convenience requires that it should be so; otherwise it is in the plaintiff's power to evade the provisions of the act, by adopting a particular mode of proceeding which depends on his own choice." The case in Willes's Reports seems to go on a distinction between an action of replevin where damages are to be recovered, and a proceeding only to have the goods again. But the industry of the gentleman who very ably argued this case, has not succeeded in discovering such first-mentioned mode of proceeding by action of replevin to recover damages, as contradistinguished from proceedings to have the goods again. There does not appear in any of the books any proceeding in replevin which has not commenced by writ, requiring the sheriff to cause the goods of the plaintiff to be replevied to him, or by plaint in the sheriff's court, the immediate process upon which is a precept to replevy

(a) In that case it was decided, That a churchwarden taking a distress for a poor's rate under a warrant of magistrates, was entitled to the protection of the stat. 24 Geo. 2, c. 44, in an action of trespass.

the goods of the party levying the plaint. Both those modes of proceeding are in *rem*, i. e. to have the goods again: and if so, and there should not be any action of replevin for the recovery of damages only, then the case in Lord Ch. J. *Wilkes's Reports* will be an authority, in addition to that of *Milward and Caffin*, to shew that the statute 24 Geo. 2, does not extend to the case now before the Court. The reason assigned by Lord *Kenyon ab inconvenienti*, has undoubtedly great weight; but, on the other hand, it appears to us that the inconvenience of depriving the subject of his remedy by replevin is full as great, if not greater; for it may happen that no damages which a jury is properly authorized to give can compensate the loss of a particular chattel which the owner may be for ever deprived of, if he cannot sue a replevin.

In addition to the authorities quoted, the argument arising from the several statutes is very strong in favour of the plaintiff. The stat. 43 Eliz. c. 2, which is the foundation of the poor's rate, considers replevin as a proceeding in which the right to levy by distress any sums claimed on account of that rate, may be properly controverted; for by the 19th sect. of that act, a form of avowry is given in case of a distress made: and the distress under that statute was in the nature of an execution; for the sums assessed for the relief of the poor, are by the 4th sect. directed to be levied by distress and sale; and it would be going very far indeed to say that so beneficial a remedy is indirectly taken away by the general words of the stat. 24 Geo. 2, when the provisions which are enacted in that statute as to the form of plea, &c. are not adapted to the proceedings in replevin; and though it was truly said that prior to the stat. 27 Geo. 3, c. 20, a demand of a copy of the warrant might have been made, and notice given with effect to the magistrate before the distress was sold, the time for such sale being then indefinite, yet it is not to be intended that the Legislature would have passed that act in way to defeat the remedy by replevin, had it been supposed that the stat. 24 Geo. 2, had extended to it. In truth, the stat. 27 Geo. 2, leaves the question upon the construction of the stat. 24 Geo. 2, as applied to a poor's rate, where it was before: for antecedently to the stat. 27 Geo. 2, a distress taken for the poor's rate under the stat. 43 Eliz. c. 2, s. 13, might have been sold immediately; and a replevin in such case, in order to serve the

1805.

FLETCHER
against
WILKINS.

[288]

1805.
FLETCHER
against
WILKINS.

the party, must have been sued out as soon as possible after the distress made, without waiting for a copy of the warrant or the giving of notice to the magistrate: and from the incongruity between the steps required and provisions directed by the stat. 24 Geo. 2, and the proceedings in replevin, in addition to the reasons before given, we think it was not intended by the Legislature that the provisions of the stat. 24 Geo. 2, c. 44, should extend to this action of replevin.

Judgment for the Plaintiff.

[289]

Monday,
Feb. 11th.

ROACH and Another against WADHAM.

The same against the same, Executor of J. WADHAM.

WHERE an estate was conveyed to a trustee habendum to him & his heirs, to the use of such person and for such estate as *W.* should by deed, &c. appoint, and for want of such limitation to the use of *W.* and his heirs; and the same conveyance reserved a certain fee-farm rent to the chief lord, and contained a covenant by *W.* his heirs & assigns, for the payment of it, held, that *W.* took a vested fee liable to be divested by the execution of his power of appointment. And *W.* having contracted to sell the estate afterwards by indentures of lease and release, to which he and his trustees were parties, after reciting the former conveyance, the trustee, by direction of *W.* did grant, bargain, sell, and release, and *W.* did grant, bargain, sell, alien, release, ratify, and confirm, and also direct, limit, and appoint to the purchaser and his heirs all their estate, title, interest, use, trust, &c. in law and equity, subject to the reserved rent, and to the performance of covenants on the part of *W.* to be performed; and the purchaser also covenanted with *W.* to pay the said rent, and to indemnify and save him harmless; held, that the purchaser took the estate by the appointment of, and not by conveyance from *W.* the instruments (a lease and release) though more commonly and properly adapted to pass an interest, and containing words of grant for that purpose, yet professing in terms to be an appointment; and the trustee having joined in it by the direction of *W.* which was unnecessary if it had been intended that the purchaser should take an estate derived only out of the interest of *W.*; and it being obviously for the benefit of the purchaser to take by appointment, and such appearing upon the whole to have been the intention of the parties: and held in consequence, that the defendant, (the heir, devisee, and executor of the purchaser) was not liable in covenant for rent in arrear, either as executor or assignee of the land, which was bound in the hands of *W.*'s appointee by *W.*'s covenant.

* [290]

decease,

decease, and then charged that 10*l.* 10*s.* was due in his lifetime, viz. on the 21st of *December*, 1796, for a moiety of the rent-charge for three quarters of a year, contrary to the covenant of *William Watts*. There was a similar count as to an undivided part, for which rent was due from *Wadham* to the plaintiffs, &c. The defendant pleaded to the first count, 1. *Non est factum*, and that all the estate, right, title, and interest of *Wm. Watts* in one undivided moiety, &c. did not by appointment and conveyance vest in *J. Wadham*, deceased, in manner in that count mentioned; and pleaded in like manner to the second count as to one undivided third part; on which issues were joined. And there were similar counts and pleas in the other action against the defendant as assignee of the premises. These causes were afterwards, by an order of *nisi prius*, referred to Mr. *Puller* to decide between the parties, as if they had been tried at law, and he afterwards made his award; wherein, after stating the deed of the 24th of *June*, 1791, and also deeds of lease and release, of the 25th and 26th of *September*, 1792, after mentioned, and that *Wadham* the testator accepted the last-mentioned conveyance, and that the moieties of the rent charges mentioned in the said declarations were due and unpaid, awarded that the defendant was not liable in the one action of covenant against him as executor of *John Wadham* deceased; nor in the other action, as assignee of the said *J. Wadham* (of whom he was heir and devisee;) *J. Wadham* the deceased, as appointee under the deed of 30th of *September*, 1792, of the estate of *W. Watts* in the premises described in the indenture of the 24th of *June*, 1791, not being liable in law upon the covenant made by *W. Watts* with the plaintiffs. A rule *nisi* having been obtained for setting aside the award as contrary to law, the Court, when cause was to be shewn, directed the facts to be stated in the form of a case, and that extracts from the deeds, so far as they were material to the question, should be set forth; which were as follows:—

By indentures of lease and release, dated the 23d and 24th of *June*, 1791, the release being made between *John Russ* of the first part, the plaintiffs of the second part, *Rachael* the wife of *John Punter* of the third part, *William Watts* of the fourth part, and *Thomas Coates* of the fifth part; *Russ* being seised in fee of one undivided third part of the said messuage and hereditaments; and the plaintiffs being

1805.

ROACH
against
WADHAM.

[291]

1805.

ROACH
against
WADHAM.

being seised in fee of the other two undivided third parts, according to their several and respective shares and interests therein, did grant, release, and convey the said messuage, &c. unto *Thomas Coates*, his heirs and assigns for ever, “*habendum* the same unto the said *Thomas Coates*, his heirs and assigns, to the use of such person and persons, for such estate and estates, by such parts, shares, and proportions; and in such manner and form as the said *W. Watts* by any deed or deeds, writing or writings under his hand and seal, to be by him duly made and executed in the presence of, and attested by two or more credible witnesses; or by his last will, &c. shall limit, direct, or appoint, give, or devise the same; and for want of such limitation, and as soon as such limitation, &c. shall cease and determine; and as to such part and parts thereof whereof no such limitation, direction, or appointment shall be made, to the only proper use and behoof of the said *William Watts*, his heirs and assigns for evermore, absolutely discharged from the several uses, trusts, limitations, provisos and agreements, in the said indenture of settlement contained; to be holden of the chief lords of the fee of the said premises, &c. by the rents and services therefore due and of right accustomed.” *Reddendum* as follows; “Yielding and paying, and the said *W. Watts*, and by his direction the said *T. Coates*, do, and each of them doth grant out of the said messuage and hereditaments hereby granted and released unto the plaintiffs, their heirs and assigns for ever, the yearly fee farm rent or rent-charge of 28*l.* &c. (payable quarterly) on certain days.” And *W. Watts*, for himself, his heirs and assigns, did thereby covenant and grant to and with the plaintiffs, their heirs and assigns (amongst other things) that he, *Watts*, his heirs and assigns would pay, or cause to be paid to the plaintiffs, their heirs and assigns, the said yearly rent of 28*l.* on the days and times, and in manner and form aforesaid. By this deed a rent charge of 14*l.* was in like manner reserved to *Russ*. The deed also contained a clause of distress, and proviso for re-entry in case of non payment of the said rent charge of 28*l.* By indentures of lease and release, dated the 25th and 26th of September, 1792, the release being made between the said *W. Watts* of the first part, *James Shoopliolme* (a trustee for *Watts* as to other hereditaments comprized in the deed now stating) of the second part, the aforesaid *T. Coates* of the

third

third part, the defendant's testator *J. Wadham* (but who did not execute the deeds) and one *T. Stevens* of the fourth part, *J. Powell* (a trustee to bar dower named by *J. Wadham* the testator, and the said *Stevens*) of the fifth part, *T. Jones* (a mortgagee for a term of 1000 years, created by said *Watts* in the hereditaments conveyed to him by the indenture before stated) of the sixth part, and *R. Bolger* (a trustee named on behalf of said *Wadham* the testator, and the said *Stevens* as to the remainder of the said mortgage term intended to be thereby assigned to attend the inheritance) of the seventh part. After reciting the indentures of lease and release before stated, and the mortgage of the said hereditaments granted by the said *Watts* to the said *Jones* for 1000 years, for securing 500*l.* and interest, by indenture dated the 12th of *April* then last; also reciting a contract dated the 18th of *May* then last, whereby the said *Watts* covenanted with the said *Wadham* the testator, and the said *Stevens*, on or before the 18th of *June* then next, to convey to them, their heirs, and assigns, as tenants in common (*inter alia*) the afore-said messuage and hereditaments; and whereby in consideration thereof, the said *Wadham* and *Stevens* covenanted each for himself, his heirs, executors, &c. with the said *Watts* to pay to him on the execution of such conveyance 1000*l.* viz. one moiety thereof by *Wadham*, his heirs, executor, &c.; and the other moiety by *Stevens*, his heirs, executors, &c.; and also out of the first ground rents to be reserved out of all the said ground, from any other grant to be made over and above (*inter alia*) the yearly sum of 42*l.* payable out of the ground granted by *Russ* and *Punter*, to convey to *Watts*, his heirs and assigns, ground rents of a certain amount: reciting also, that by lease and release, bearing date with the deed now stating the whole of the said contract of the 18th of *May* had been carried into execution, except the conveyance of the hereditaments hereinafter conveyed; reciting also that there was then due to the said *Jones*, on his said security, 500*l.* which it had been agreed should be paid out of the said 1000*l.* mentioned in the said contract; it is witnessed, that in full performance of the said contract of the 18th of *May*, and in consideration of 500*l.* paid to the said *Watts* by the said *Wadham* (being the same sum as in the said indenture or equal date is mentioned to be paid by *Lockier* to *Watts*) and in consideration of 500*l.*

1805.

ROACH
against
WADHAM.

[293]

[294]

to

1805.

ROACH
against
WADHAM.

to the said *Jones* paid by *Stevens* by direction of *Watts*, the said *Coates*, by direction of *W. Watts*, did according to his estate and interest, bargain, sell, and release, and the said *W. Watts* did grant, bargain, sell, alien, release, ratify, and confirm, and also limit, direct, and appoint unto the said *Wadham* the testator, *Stevens* and *Powell*, and to their heirs and assigns for ever, the said messuage and hereditaments comprized in the indentures first before stated, and all the estate, right, title, interest, use, trust, possession, freehold inheritance, property, benefit, and equity of redemption, challenge, claim, and demand whatsoever, both at law and in equity, and otherwise however, of the said *W. Watts* and *T. Coates* respectively, and of each and every of them, of, in, to, and out of the said hereditaments and premises, &c. to hold the same unto the said *Wadham*, the testator, and the said *Stevens* and *Powell*, and the heirs and assigns of the said *Wadham* and *Stevens* for ever, as tenants in common; in trust, as to the estate of *Powell*, for *Wadham*, *Stevens*, their heirs and assigns as tenants in common; in trust as to the estate of *Powell* for *Wadham* and *Stevens*, [their heirs and assigns as tenants in common, subject nevertheless as to the said messuage and hereditaments called the *Blackmoor's Head* to the payment of the said yearly fee farm rent of 42*l.* reserved by the said indentures of lease and release of the 23d and 24th of *June*, 1791, and to the powers and remedies therein contained for enforcing the payment thereof when in arrear, and to the performance of the covenants in the said indenture of release contained, which thenceforth on the part and behalf of the said *W. Watts*, his heirs, and assigns ought to be paid, observed, and performed. And in the said indenture is contained the following covenant: And the said *John Wadham* and *T. Stevens* for themselves severally, and for their several and respective heirs, executors, &c. did covenant and agree with the said *W. Watts*, his heirs and assigns, "in equal shares and proportions, well and truly to pay the said fee farm rent of 42*l.* so reserved, &c. by the indentures of 1791, i. e. one moiety thereof by the said *John Wadham*, his heirs and assigns, and the other moiety thereof by the said *T. Stevens*, his heirs and assigns: and also to fulfil and keep all and every the covenants, clauses, provisos, and agreements contained in the said indenture of release of 1791, on the part of the said *W. Watts*, his heirs or assigns, to be performed, &c.; and from the payment of the

[295]

the said yearly fee farm rent of 42*l.* and the performance of the said covenants, &c. and all actions, &c. charges, damages, and expences on account of the same rent, covenants, &c. and agreements, or otherwise relating thereto, to keep harmless, &c. and indemnify, &c. the said *W. Watts*, his heirs, executors, and administrators," &c. *Wadham*, the testator, died, not having parted with, sold, or in anywise aliened the abovementioned premises, and left the defendant sole devisee in fee of all his real estates, messuages, lands, and hereditaments in possession, reversion, remainder, or expectancy, and of all his copyhold and personal estate and property; and appointed him sole executor thereof. The defendant proved the said will. The premises in question are not particularly mentioned in the will. After the death of *Wadham* the testator, one moiety of the said fee-farm rent of 28*l.* for three years, amounting to 42*l.* became due, and still is unpaid to the plaintiffs. The question for the opinion of the Court was, Whether the defendant, as executor, or devisee of the testator *J. Wadham*, were liable in law to an action of covenant upon the said covenant made by *Watts* under the conveyance before stated? If the Court should be of opinion that he was, the rule for setting aside the award was to be made absolute: if not, it was to be discharged.

1805.

ROACH
against
WADHAM.

[296]

Dampier, for the plaintiffs, after stating the question to be, Whether the indentures of lease and release of the 25th and 26th of *September*, 1792, were to be taken only as an execution of the power supposed to be reserved to *Watts* by the deeds of the 23d and 24th of *June*, 1791? in which case he admitted, That the actions could not be maintained, contended, 1st, That *Watts* having a fee under the deeds of 1791, defeazable only by this supposed power, of which he himself was the donee, and which operated only on his own estate, the power was nugatory, and his conveyance necessarily operated on his interest. The *habendum* in the deeds of 1791, is to *T. Coates* and his heirs, to the use of such persons, and for such estates, &c. as *W. Watts* should by deed or will appoint; and for default of appointment to him in fee. Then, according to *Doe v. Willis*, (a) he took a fee defeazable by the execution of this power, if it be one. The same doctrine was laid down by the Master of the Rolls

(a) 4 Term Rep. 39, 64, 5.

1805.

ROACH
against
WADHAM.

[297]

in *Maundrell v. Maundrell*. (a) But he there considered, That under a limitation before marriage of an estate to such uses as the husband should by deed or will appoint; and in default of appointment to him in fee, the power of appointment was merely nugatory, and nothing distinct or different from the fee: and he held that a purchaser after marriage took subject to the right of dower; though that opinion was ultimately formed upon the terms of the conveyance which he thought were adapted to pass the husband's interest in the estate, and not by way of appointment. He referred, however, to *Godhill v. Brigham*, (b) as shewing that a power added to a fee was merely void. A power was there defined in the argument to be "an authority given to one person to be exercised over the estate of another;" and this was afterwards confirmed by *Eyre*, C. J. and *Buller*, J. And it was said, That there was no case where an authority to be exercised over the estate of the donee had been construed to be a power: and this is consistent with the reason of the thing; for what a person does with his own estate, is by the inherent force of his seisin and interest in it, and not by any power superadded to his interest. Powers operate as appointments of uses; and the execution of them is upheld by an artificial system built upon the nature of uses; all which is superfluous where the conveyance does nothing more than what the owner's interest in the estate would enable him to do: and here *Watts* had the legal estate in fee, and the power gave him no additional dominion over the estate. He could not be said to hold an estate in fee simple defeazable by the exercise of a right which is the natural consequence of such an estate. The legal exercise of a right attached by law to an estate cannot be deemed to destroy the estate. And though Lord *Alvanley*, when Master of the Rolls, gave it as his opinion in *Cox v. Chamberlain* (c) that such a power is not inconsistent with a fee, and so far overruled *Godhill v. Brigham*; yet the principle of the latter case was subsequently recognized by the present Master of the Rolls in *Maundrell v. Maundrell*; (d) who said that a power followed by a limitation of a fee must be absorbed in the fee, which includes every power. But, 2dly, Supposing *Watts* to have had both a power and an interest, the estate conveyed by him

[298]

(a) 7 Ves. jun. 567, 582, 3.

(b) 1 Bos. et Pull. 192.

(c) 4 Ves. jun. 631.

(d) 7 Ves. jun. 583.

took

took effect out of his interest, and not out of his power. *Watts* having a complete fee, subject to the charge created by the deeds of 1791, had the full and uncontrolled dominion over his estate. Thus circumstanced, he first mortgaged for 500 years, then contracted to sell, and finally, in September, 1792, conveyed away the property. The mode of conveyance was by *lease and release* which is better adapted for transferring an interest than for executing a power. If he had meant merely to execute his power, he would have done it at once by a deed of appointment, and there would have been no necessity to have first put the purchaser in possession by lease. Nor does it appear that he meant to exempt the assignees from the payment of the rent; for by that very deed they covenant to pay it, and to indemnify *Watts*. The Court will, if they can, make the deed operate according to the intention; and if it be not necessarily confined to an execution of the power, it will operate on the interest. Now, the first, which are the operative words, are words of conveyance; viz. "grant, bargain, sell, alien, release, ratify, and confirm;" the others are only thrown in by way of caution. The rule laid down in *Parker v. Kett* (a) and recognized by Lord *Kenyon* when at the Rolls, in *Andrews v. Emmett*, (b) is, "That where one has interest and an authority together, and he does an act generally, it shall be construed in relation to his interest and not to his authority." The same point is laid down in *Collet v. Bishop of Coventry*, (c) founded on Sir *E. Clere's* case; (d) in which, according to the second resolution, the Act was ruled to take effect out of the interest, although by that construction it was rendered void as to one third: but, upon this point, the case of *Cox v. Chamberlaine* (e) is decisive. There, one who had an interest and also a power (the estate being conveyed to such uses as he should appoint, and in default of appointment to him in fee) by lease and release "in pursuance of all powers in him vested, did grant, bargain, sell, alien, remise, release, and confirm, limit, declare, and appoint" the estate, &c.; and held that the conveyance was to be taken as passing his interest, and not as an execution of his power. The Master of the Rolls there relied upon the mode taken for passing the estate, which was

1805.

ROACH
against
WADHAM.

[299]

(a) 12 Mod. 469.

(b) 2 Bro. Chan. Cas. 300. The same rule was recognized in *Roe d. Earl of Berkeley v. The Bishop of York*, ante, 108.

(c) Hob. 159.

(d) 6 Rep. 17. b.

(e) 4 Ves. Jun. 631.

1805.

ROACH
against
WADHAM.

[300]

not by expressly declaring, that in pursuance of his power he appointed, but by the conveyance of lease and release, in which he used words that could not at all apply to the power. It is true that an objection was there intimated, that as an execution of the power the deed would have been invalid, as vesting a trust-estate instead of a legal estate as required by the power; however, the Master of the Rolls declined determining that point; but, in this case, one of the remedies, and the natural and proper remedy for the rent, would be taken away by holding this to be an execution of the power; and thereby too, the takers under the deeds of 1792, will not be subject to the performance of the covenants made by *Watts*, which it was expressly stipulated that they should: for the covenant of indemnity is only in case the parties should elect to proceed against *Watts*. It may be said that the power is recited in the deed of 1792: but it is no otherwise so than by the recital of the indentures of 1791; and the interest being therein recited as well as the power, nothing can be concluded from thence. And in *Cox v. Chamberlain*, the party stated that he did the act in pursuance of all powers vested in him.

Abbott, *contra*, admitted that the authorities went to sustain the argument that the fee vested in *Watts*; but contended that the deeds of 1792 were an execution of his power and not a conveyance of his interest; and that the covenant for the payment of the rent-charge did not pass with the estate, though the plaintiffs were not without remedy; for they might distrain or re-enter, or sue *Watts* upon his express covenant. It is not, however, disputed, That if *Wadham* the Elder took by appointment, this action is not maintainable; (a) for then he had not the estate of *Watts*, but took as if the original conveyance had been made to himself. Now, here all the circumstances shew that the parties to the deeds of 1792 contemplated the execution of the power given to *Watts*. The premises were conveyed to *Coates* to the use of such person, and for such estate, &c. as *Watts*, the covenantor, should by deed, &c. direct, limit, and appoint. Then in the deed of 1792 the former conveyance is recited, and *Coates grants and releases*; and *Watts*

(a) Vide *Webb v. Russel*, 3 Term Rep. 402. per Lord Kenyon, C. J. "It is not sufficient that a covenant is concerning the land; but, in order to make it run with the land, there must be a privity of estate between the covenanting parties."

bargains,

bargains, &c. and also *limits and appoints*: these latter words can only refer to the execution of the power; nor can the conveyance by *Watts* operate in any other way; though if it were considered as a conveyance by *Coates*, with the consent of *Watts*, still the defendant would not be chargeable in this action, because he is not sued as the assignee of *Watts*. The case of *Goodhill v. Brigham* (a) went upon this, that a power given to a *feme covert* by will, to dispose of an estate in fee before given to her by the same will, was inconsistent with such estate; but the doctrine of that case was much doubted in *Cox v. Chamberlain*; (b) and though said to be afterwards recognized in *Maundrell v. Maundrell*, (c) yet the latter having been since reversed in the House of Lords, the doctrine of *Cox v. Chamberlain*, that such a power of appointment is not inconsistent with an interest in the fee, stands confirmed. Then, 2dly, Admitting that by such a conveyance as this *Watts* might have conveyed an interest; yet as he might also have limited a use, and it appears that he contemplated the latter, therefore the Court will construe the deed accordingly. Sir *E. Clere's* case (d) went on the ground that the party intended to pass an interest; and stress was laid on his having devised the land as owner without any reference to his authority. Now here there is an express reference to the authority by the words of *direction, limitation and appointment*. So this case is also distinguishable from *Cox v. Chamberlain*; (e) for there the deed was irregular as an execution of the power, and good only as passing an interest: the objection, therefore, went to invalidate the deed. There too the trustee was no party to the conveyance as here; but taking the conveyance to be adapted to either purpose, the Court will so construe it as will best promote the object of the parties. And it is well known that conveyances are made in this form, in order to enable the purchaser to bar the dower of the wife of the vendor, and to prevent the necessity of levying a fine; and though, if the purchaser be well advised, he will only have words in the deed to limit the use, yet it is more common to include all the words of grant, &c. here found, and to make the trustee a party. [*Lawrence, J.* observed, That there was another mode of conveyance sometimes used

1805.

ROACH
against
WADHAM.

[301]

[302]

(a) 1 Bos. et Pull. 192.

(b) 4 Ves. Jun. 637.

(c) 7 Ves. Jun. 567.

(d) 6 Rep. 17, b.

(e) 4 Ves. Jun. 631.

1805.

—
ROACH
against
WADHAM.

to prevent the right of dower, which was to convey to a trustee to uses for such purposes as the purchaser shall appoint, and in the mean time and until appointment to the purchaser for life, &c.]

Dampier, in reply, said, That on the second ground, the case was resolved into a question of intention. (And being asked by the Court what the object of the parties in casting the conveyance into this form could be, unless to bar dower) he admitted that that might have been one of the objects; but another object was to enable the owner to make the estate liable to the rent-charge, and not to rest only on the security of the covenant of the party: and this intent was evidenced by the covenants to pay the rents.

[303] Lord ELLENBOROUGH, C. J. then said, This is a conveyance with a double aspect, having words which indicate an intention to pass an interest and to limit an use, and to be taken either as a conveyance or as an appointment. We will, therefore, look into the deeds and see which is the predominant intention; and afterwards his lordship delivered the opinion of the Court. The short statement of these cases is as follows:—By certain indentures of lease and release, dated the 23d and 24th of *June*, 1791, the release being made between *John Russ* of the first part; the plaintiffs of the second part; *Rachael*, wife of *John Punter*, of the third part; *Wm. Watts* of the fourth part; and *Thomas Coates* of the fifth part: *Russ*, who was seised of one undivided third part of a certain messuage and lands; and the plaintiffs who were seised of the two other undivided third parts thereof, according to their respective interests, conveyed the same to *Coates*, his heirs, and assigns, *habendum* to him, his heirs, and assigns, to the use of such persons, and for such estates as *William Watts* by any deed attested by two credible witnesses, or by his last will, should limit, direct, or appoint; and for want of such limitation, to the only proper use and behoof of *Wm. Watts*, his heirs and assigns for ever, yielding and paying to the plaintiffs, their heirs and assigns for ever, the yearly fee-farm rent or rent-charge of 28*l.* on certain days therein mentioned: which rent *William Watts* for himself, his heirs, and assigns, covenanted to pay to the plaintiffs, their heirs and assigns, on the days and times mentioned in the deed; and by the deed, a rent-charge of 14*l.* is in like manner reserved to *Russ*, who was seised of the other undivided

vided third part; and there are powers of distress and re-entry for non-payment. By indentures of lease and release, dated respectively the 25th and 26th of September, 1792, the release being made between the said *William Watts* of the first part; *James Shoopholme* of the second part; the said *Thomas Coates* of the third part; the defendant's testator, *John Wadham*, and one *Thomas Stevens*, of the fourth part; and *Joseph Powell*, a trustee to bar dower, of the fifth part, and other persons whom it is not necessary to state; for certain considerations therein mentioned, the said *Coates* by the direction of *Watts*, did, according to his estate and interest, bargain, sell, and release; and the said *Watts* did grant, bargain, sell, and release, ratify, and confirm; and also limit, direct, and appoint, unto the said *Wadham* the testator, *Stevens*, and *Powell*, and to their heirs and assigns for ever, the said messuage and land to hold to them in fee as tenants in common, subject nevertheless to the payment of the said yearly fee-farm rents of 42*l.* and to the performance of the covenants in the indenture of the 23d and 24th of June, 1791, on the part and behalf of the said *William Watts*, his heirs and assigns, to be observed and performed: and the said *Wadham* and *Stevens* did by the said indenture of 1792, covenant with *Wm. Watts*, his heirs and assigns in equal shares and proportions, to pay the fee-farm rents of 42*l.* and perform, fulfil, and keep all and every the covenants, clauses, provisoes, and agreements, contained in the said indenture of 1791, which by *Watts*, his heirs, and assigns, ought to be performed or fulfilled; and to keep the said *Watts*, his heirs, executors, and administrators, indemnified and saved harmless from all damages on account of the same rent and covenants. *Wadham*, the testator, afterwards made his will, by which he made the defendant his sole devisee and executor, and died without revoking it. The defendant proved the will; and afterwards one moiety of the said rent of 28*l.* for three years, amounting to 42*l.* became due to the plaintiffs; to recover which the present actions, one against the defendant charging him as assignee, and the other against him in his character of executor to *Wadham* the testator, were brought; and they were referred to Mr. *Puller*, who by his award, dated the 31st of May, 1802, determined that the defendant was not liable in either of the actions; *John Wadham* the Elder being, in his opinion, as appointee of the estate

1806.

ROACH
against
WADHAM.

[304]

1805.

ROACH
against
WADHAM.

estate of *Wm. Watts*, not liable in law upon the covenants made by the said *Wm. Watts*. Mr. *Fuller*, having stated the indentures of 1791 and 1792 at large in his award, has given the plaintiffs an opportunity of taking the opinion of the Court upon the propriety of his decision, by a motion to set his award aside. It was admitted by the counsel for the defendant that the conveyance to *Watts* vested in him an estate in fee-simple, liable to be divested by an exercise of the power of appointment (and which he contended had been done;) and though the plaintiff's counsel at first insisted that the power was nugatory, and that the conveyance necessarily operated on the interest of *Watts*, yet he afterwards abandoned that ground in his reply, and agreed that the only point was, Whether the conveyance operated on the interest which *Watts* had, or as an execution of the power: and that it was a question of mere *intention*; and if that be so, it ought to appear very clearly that the covenants and provisions in the deeds cannot take effect if the conveyance should be holden to operate as an appointment, in order to authorize the Court so to determine where the instrument in its terms professes to make an appointment; and where *Coates*, 'the trustee, joins in the conveyance,' and by the direction of *Watts*, bargains, sells, and releases to *Wadham*. Had it been the intention of the parties that the estate which *Wadham* was to take should be derived out of the interest which *Watts* had, it would have been wholly unnecessary that *Coates* should have been a party to the deed; his being made a party to it shews that *something* was to be taken by way of appointment; and if any thing, there is nothing from whence there can be collected an intention that *less than the whole* should pass by those means: the reason for which is obvious, as it might prevent such objections to the title as might be made if it were derived immediately from *Watts*. The covenants in the deed of 1792 do not appear to us at all to militate with this construction; for had it been the intention of the parties that *Wadham* should take as the assignee of *Watts*, such covenant on the part of *Wadham* would have been less necessary than if he were intended to take as appointee; for in the former case *Watts* would have had some security that he would not be called upon to pay this rent, arising from the circumstance of *Wadham's* being liable to be sued by *Roach*; but whether the conveyance were intended to operate

[306]

rate

rate in the one way or the other, these covenants were fit and proper for the security of *Watts*; for if *Wadham* were the assignee, and liable to be sued in covenant, *Roach*, if *Wadham* did not pay the rent, might sue *Watts* on his covenant to pay it; and in that case *Wadham's* covenant was proper for *Watts's* indemnity; and, if *Wadham* were not liable to be sued by *Roach*, and it was nevertheless the intention of the parties that *Wadham* should pay the rent, a covenant from him to *Watts* to pay such rent, and to indemnify *Watts* therefrom, became the more necessary. The making *Watts* join in the lease and release of the 25th and 26th September, 1792, as a party conveying, proceeded, as we conceive, only from the common caution of conveyancers, who, where a man has a power of appointment over land as well as an interest in it, make him both appoint and convey, in order that if there should be any defect in the creation, continuance, or execution of the power, the conveyance may operate upon his estate and interest. For these reasons, we are of opinion that the award of Mr. *Puller* is right, and that the rule for setting it aside must be discharged.

Rule discharged.

1805.
ROACH
against
WADHAM.

[307]

EGERTON against MATHEWS and Another.

Tuesday,
Feb. 12th.

THIS was an action on the case against the Defendants, for not accepting and paying for certain goods which they had contracted to purchase by the following memorandum in writing:—"We agree to give Mr. *Egerton* 19d. per lb. for 30 bales of *Smyrna* cotton, customary allowance, cash 3 per cent. as soon as our certificate is complete. (Signed) *Mathews* and *Turnbull*, and dated 2d Sept. 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance; and after it was allowed they signed the memorandum again. On the opening of the case at the trial at the sittings after last Term at *Guildhall*, it was objected, on the authority of *Wain v. Warlters*, (a) that the contract being altogether executory, and no consideration appearing on the face of the writing for the promise, nor any mutuality in the engagement, it was void by the statute of frauds, 29 Car. 2. c. 3. And it not being at that time adverted to that the case cited turned upon the meaning of the word *agreement* (i. e.

A memorandum signed by the defendants, whereby they agreed to give so much for goods, takes the case out of the 11th sect. of the statute of frauds, tho' not signed by the seller, nor expressing any consideration for the defendants' promise, otherwise than by inference from their own obligation.

(a) 5 East, 19.

1805.

EGERTON
against
MATHEWS.

[308]

to pay the debt of another) in the 4th clause of the statute, and that this case was governed altogether by the 17th clause, (a) the object and wording of which is different, and which has not the word *agreement*, the plaintiff was nonsuited. But on a motion for setting aside the nonsuit, when the attention of the Court was called to the difference of the two clauses, Lord *Ellenborough*, C. J. on granting a rule *nisi*, expressed his assent to the distinction between the two cases; and said, That the nonsuit had proceeded upon a mistake at the trial in supposing that they were the same;—and on this day, when

The Solicitor General and *Marryat* were to have shewn cause against the rule (after suggesting that the words *contract* and *bargain* in sec. 17. implied *mutuality* and *consideration* as much as the word *agreement* in clause 4, and therefore brought the case within the principle of the former decision;) finding that the whole Court were decidedly of opinion that the action was sustainable upon sec. 17 of the statute, they relinquished any further opposition to the rule; and

Lord *ELLENBOROUGH*, C. J. observed, That the words of the statute were satisfied, if there were “some note or memorandum in writing of the *bargain*, signed by the parties to be charged by such contract.” And this was a memorandum of the bargain; or, at least, of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires.

LAWRENCE, J. The case of *Wain v. Warlters* proceeded on this, That in order to charge one man with the debt of another, the *agreement* must be in writing; which word *agreement* we considered as properly including the *consideration* moving to as well as the *promise* by the party to be so charged; and that the statute meant to require that the whole agreement, including both, should be in writing.

The other Judges concurring, Rule absolute. (b)
Garrow, *Park*, and *Espinasse* were for the rule.

(a) By this clause “no contract for the sale of any goods, &c. for the price of 10*l.* or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

(b) Vide *Saunderson v. Jackson*, 2 Bos. et Pull. 236; and *Fowle v. Freeman*, 1 Ves. Jun. 351, N. S.

1805.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

Easter Term,

In the Forty-fifth Year of the Reign of GEORGE III.

HENFREE *against* BROMLEY.

Thursday,
May 2d.

THIS case was referred to arbitration, and the umpire was to make his award under his hand, *ready to be delivered* by a certain day; on which day he accordingly awarded the Defendant to pay to the Plaintiff 57*l.* and signed the award; recommending to the parties at the same time by parol, to pay the costs of the reference in equal moieties: and he then put the written award in the hands of his own attorney, who sent notice immediately to the defendant that the award was executed and ready for delivery: but, on the same day, the umpire having been informed that the defendant refused to pay his share of the costs of the reference, took the award, before it was delivered by his attorney, and struck his pen * through the 57*l.* (still, however, leaving it legible) and inserted the sum of 66*l.* in order to include the defendant's moiety of the costs; after which he re-signed the award with a dry pen, and such his signature was attested by witnesses, and notice of the award so altered was given to the parties.

An application was made in the last term for an attachment for non-performance of the award upon an affidavit of service of it, and a demand of the 66*l.* and there was an adjournment of the party interested.

1805.
 HENFREE
 against
 BROMLEY.

verse application to set aside the award as being vitiated by such alteration. These rules came on together in the last term, when *the Court*, after hearing counsel, were of opinion that the award having been once complete by the first signature of the umpire, and being then *ready for delivery*, (a) though not attested or delivered, which, by the terms of reference, were not necessary to perfect it, there was an end of the umpire's authority; and he could not afterwards alter the award any more than any other stranger: and, therefore, they refused the rule for an attachment for non-payment of the 66*l.* which they thought there was no authority for demanding; but the other rule for setting aside the award was enlarged to this term, to consider, on the one hand, whether the award were not altogether vitiated by the alteration; and, on the other hand, to enable the plaintiff to make a new demand of the lesser sum originally awarded, and apply for a new rule for an attachment in case of non-payment of it, upon the supposition that the award was good for the original sum inserted in it, notwithstanding the subsequent obliteration made by the umpire without authority.

[311] *Gurney* was now heard in support of the award; and contended, That if the umpire had no authority to make the alteration, that award must be good for the original sum, the alteration having been made by mistake, and not with any fraudulent purpose; and said, that were it not for the opinion expressed by the Court in the last term, he should have contended, that the umpire might have corrected the mistake he had made in putting in a wrong sum at any time before the award was delivered out of his hands.

Lord ELLENBOROUGH, C. J. This was not a mere mistake of the umpire in putting down one sum instead of another, as in casting up an account wrong, or the like; but it was a new and distinct act of judgment formed by him after his authority was spent, and he was *functus officio*. Still, however, I see no objection to the award for the original sum of 57*l.*; for the alteration made by him afterwards, was no more than a mere spoliation by a stranger, which would not vacate the award. He only intended originally

(a) Vid. *Brown v. Vawser*, 4 East, 581.

to give a recommendation to the parties to divide the costs of the reference between them, and not to make it part of his award. Then when he found that the defendant would not pay his share, he tried to resume his authority again, after he had laid it down; which he could not do.

Erskine and *Pooley* were to have supported the rule for setting aside the award, upon the ground of the alteration having vitiated it altogether; and referred to *Pigot's* case, (a) where it was resolved, "that when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by drawing of a pen through a line or any material word, &c. the deed thereby becomes void:" and so, it is added, "although the first word be legible." But finding the opinion of the Court decidedly against them on this point, they did not press the argument further.

LORD ELLENBOROUGH, C. J. I consider the alteration of the award by the umpire, after his authority was at an end, the same as if it had been made by a stranger, by a mere spoliator; and I still read it with the eyes of the law, as if it were an award for 57*l.* such as it originally was. If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection; but I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident.

Per Curiam,

Rule for setting aside the
award discharged.

(a) 11 Rep. 27, a.

1805.

HENFREE
against
BROMLEY.

[312]

1805.

*JACOB against BOWES.**Thursday
May 2d.*

The Court will enter an exoneretur on the bail-piece on payment of the sum sworn to and costs, tho' less than the sum acknowledged to be due, as well where the action is by original as by bill.

[313]

THE *Solicitor General* shewed cause against a rule for entering an *exoneretur* on the bail-piece on payment of 86*l.* which it now appeared was the sum sworn to, but which was less than the sum due, for which a *cognovit* was given; the recognizance of bail being in 172*l.* by each of the bail. He observed, that however the general practice might warrant such an application, it applied only to actions commenced by bill; but this was by original, and, therefore, ought to be governed by the same rule of construction on the recognizance as prevails in *C. B.* where in *Dahl v. Johnson*, 1 *Bos. et Pull.* 205, each of the bail were holden liable to the amount of his recognizance, which had been taken in double the sum for which the Defendant had been ordered to be holden to bail by a judge's order. In truth, the recognizance does not mention the sum sworn to, but each of the bail have bound themselves in the sum of 172*l.* to be levied of his goods, &c. if his principal be convicted and shall not pay what is *recovered* of him, or render himself.

Lawes, in support of the rule, referred to *Clarke v. Bradshaw*, 1 *Eust.* 86, as in point; the only distinction being, that there the proceedings were commenced by bill; but said that there was no distinction in practice between actions by bill, and by original in this respect; and

The Court (after consulting the Master) said, That there was no distinction in practice between the two modes of proceeding; but in either case the bail were entitled to be relieved on payment of the sum sworn to and the costs. The practice, they observed, was founded on the rule of Court (a) of *E. 5 Geo. 2*, the terms of which were general; whereby it was ordered, that where the Plaintiff recovers a greater sum than is expressed in the process, on which he declares, the bail shall be liable for the sum sworn to, and indorsed on the said process, or for any lesser sum which the plaintiff shall recover. That by an extension of the rule, the bail were also liable for the costs. (b) Rule absolute.

(a) Rules and Orders of B. R. 10.

(b) It appeared by affidavit that the costs of this action had been paid.

1805.

PRIGMORE *against* BRADLEY.Friday,
May 3d.

MARRYAT moved for a rule to shew cause why a judgment of *non pros* and execution thereon should not be set aside for irregularity with costs, and the money levied be restored. The Plaintiff proceeded by bill; the process was returnable the first return of last *Michaelmas* term; and the appearance was not entered till the 22d of *January*, after the *essoign* day of last *Hilary* term, the day before the commencement of full term. And the question was, Whether an appearance so entered could be entered as of *Michaelmas* term preceding? if it might, then the *non pros* signed on the 6th of *March* for want of declaring was regular; otherwise not. The stat. 13 Car. 2, st. 2, c. 2, s. 3, enacts, That upon appearance to be entered in the term wherein such process, &c. is returnable, the bond for appearance shall be discharged; and unless the plaintiff shall declare "before the end of the term next following after appearance, then a nonsuit for want of a declaration may be entered. And he cited *Holmes v. White*, E. 11 Geo 3, *Impey's Inst. Cler. K. B.* 415, (a) where, on a motion to set aside a *non pros*, the master was of opinion that a *non pros* could never be signed unless bail were filed in the term in which the writ was returnable: and he said, that though in practice judgments of the antecedent term were signed after the *essoign* day of the next term, yet they were always dated as of the day preceding the *essoign* day; but

The Court (after consulting the Master) said, That till the commencement day of full term (the 23d of *January*) the party was at liberty to enter his appearance as of the antecedent term; and, therefore, the *non pros* was regular. [315]

Rule refused.

(a) 4th edit. tit. *Non pros*.

1805.

*Saturday,
May 4th.*

The KING against REYNELL, Clerk.

The Court refused to grant a rule nisi for a new trial after a verdict for the defendant upon an indictment for non-repair of a church-yard fence, which was moved on the ground of the verdict being against evidence.

THIS was an indictment for the non-repair of the fences of the church-yard of the parish of *Hornchurch*, which it was alleged that the vicar had been immemorially bound to repair; by means of which, swine and other cattle broke in and rooted up the tomb-stones and dirtied the porch of the church, and the paths leading to it; to the nuisance of the inhabitants of the parish. At the trial at the last assizes, there was a verdict for the Defendant, which

Marryat now moved to set aside, and to have a new trial, upon the ground that the verdict was against all the evidence. He admitted, however, that he had not been able to find any instance where the Court had granted a new trial in case of a misdemeanor where the verdict was for the defendant; but he contended, that this was in effect only a trial of a civil right, namely, the liability to repair, though in the form of an indictment; there being no other mode of trying the right in a case of this sort; and it was in ease of the party charged, and to prevent a multiplicity of actions. That fifty years ago the Court would never grant a new trial after a verdict of acquittal in cases of penal actions, informations in nature of *quo warranto*, and indictments; (a) but since then, there have been instances of new trials granted in the two former cases. (b) But he admitted that, in the 24 *Geo. 2*, the Court had refused to grant a new trial on an indictment against the inhabitants of a parish for non-repair of a road, where there had been an acquittal.

LORD ELLENBOROUGH, C. J. It is very clear that you may indict the defendant again, if the fences have continued out of repair since the last indictment; and that is much better than for us, in a case of such minor consequence, to make a precedent of so much importance, which may affect other cases of misdemeanors.

Per Curiam,

Rule refused.

(a) See all the cases collected in 6 *Bac. Abr.* 674, 5; edit. of 1798.

(b) *Wilson v. Russell* 4 *Term Rep.* 753; and *Calcraft v. Gibbs*, 5 *Term Rep.* 19; but these were upon the misdirection of the Judge in penal actions. But in *R. v. Francis*, 2 *Term Rep.* 484, a new trial was granted in *quo warranto* after verdict for the defendant against the weight of evidence.

1805.

HODGSON *against* GLOVER.Tuesday,
May 7th.

IN assumpsit upon a policy of insurance, tried at *Guildhall*, before Lord *Ellenborough*, C. J. a verdict was found for the Plaintiff for 200*l.* subject to the opinion of the Court, on the following case:—The plaintiff, the owner * of the ship *Monta Lambert*, in October, 1801, dispatched her from *Liverpool* for the coast of *Africa*, with a cargo of various goods, with which she was to purchase slaves, and proceed therewith to the *West Indies*, and there dispose of the same in the usual manner. The ship arrived on the coast of *Africa*, and there bartered her outward cargo for slaves, with which she sailed in May, 1802, for the *West Indies*, and arrived at *St. Vincent's*, on the 30th of June in that year. The plaintiff being informed of the ship's arrival at *St. Vincent's*, on the 6th of September, 1802, effected in *London* the policy in question for 400*l.* "lost or not lost, at and from *St. Vincent's* to the vessel's last port of discharge, final sale, and delivery; in all or any of the *West Indies* and *Bahama* islands, *America*, and the *Havannah*, with liberty to load and unload goods without being deemed any deviation." And the insurance was declared to be 'on profits valued at the sum insured: and in case of loss, no other proof of interest to be required than that policy.' The policy was under-written by the defendant for 200*l.* On the 5th of July, 1802, the vessel, without having discharged any part of her cargo, sailed from *St. Vincent's* for the *Bahama* Islands; and on the 13th, while proceeding on her voyage with her cargo of slaves, was, by the perils of the seas, wrecked and lost at the *Bahamas*. The ship was thereby totally lost, as were also many of the slaves: the remainder of them were carried in other vessels to the *Havannah*, and were there sold by the plaintiff; but their produce did not give a profit upon the whole adventure. The plaintiff was interested in the said profits to the amount of the sum insured thereon; and claims as for a total loss. And the question for the opinion of the Court was, Whether he were entitled to recover any, and what sum? If he were entitled to recover, the verdict to stand; if not, a nonsuit to be entered.

[317]

of discharge in the

Upon an insurance on profits, valued at 400*l.* where the plaintiff declared as for a total loss, and it appeared that after shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were there sold, & it did not appear what profit was made of them, or whether if all had arrived any profit would have been made; tho' it was found that the produce of those who were sold did not give a profit upon the whole adventure; held that the plaintiff was not entitled to recover. Note.—The whole adventure was a voyage from *Liverpool* to *Africa*, & from thence to the *West Indies*; but the profits were only insured from *St. Vincent's* (after the ship's arrival there) to her last port *West Indies*.

When [318]

1805.
 —
 HODGSON
 against
 GLOVER.

When this case was called on for argument, Lord *Ellenborough*, C. J. observed, That one of the questions meant to be raised was included in the case of *Lucena v. Craufurd*, now pending before the House of Lords; and the other question was decided in *Barclay v. Cousins*; (a) and, therefore, he suggested whether it would not be better to defer the argument till the decision of the former case, which would probably govern this. But *Giles*, for the Defendant, said, That he did not mean on this occasion to dispute, since the case of *Barclay v. Cousins*, that the profits of trade were insurable, as the question here was not upon the record, and the Court would no doubt decide in conformity with their former opinion; but he meant to contend, that this policy was void by the stat. 19 G. 2, c. 37, which prohibits insurance “on any goods, merchandize, or effects laden on board any ship, &c. interest or no interest, or without further proof of interest than the policy;” within the very words of which this policy came.

[319] *Richardson*, for the plaintiff, on that point, contended, That the mere insertion of the words, “in case of loss, no other proof of interest to be required than the policy,” would not vacate the policy where the insured has a *bona fide* insurable interest. The preamble and the enacting words of the statute shew that the only object of the legislature was to prevent gambling contracts. It speaks of *insurance*, which means the contract, the subject-matter, and not merely the form of the policy: it does not mention *policy*. And in construing the act, the Court have looked only to the substance of it; for insurances on *freight* are not, strictly speaking, within the words, but at most only within the equity of it. But here it is expressly found, that the plaintiff had an interest in fact at the time of the insurance. Therefore, *quacunqve via data*, the plaintiff is entitled to recover; for if the objection be resolved into the form of the policy, it is sufficient to answer, That *profits*, the subject-matter of this insurance, being neither *goods*, *merchandizes*, nor *effects*, the case is not within the words of the act; but if the substance of the act be regarded, then the plaintiff having a *bona fide* interest in the subject-matter of the insurance, it cannot be deemed a gambling policy within the statute. In no event can any inconvenience happen from

(a) 2 East, 544.

permitting the plaintiff to prove that he had an insurable interest in fact: and in *Grant v. Parkinson*, (a) where upon an insurance on profits the policy contained a clause declaring, "That in case of loss, it was agreed that the profits be valued at 1000*l.* without any other voucher than the policy;" which, in substance, is the same as the clause in question; though Lord *Mansfield* at first thought that it avoided the policy; yet he afterwards changed his opinion; and the Court concurred with him in thinking that it was not a wagering policy within the statute: and it was holden competent for the plaintiff, notwithstanding such clause, to prove an interest, in order to take the case out of the act.

LORD ELLENBOROUGH, C. J. The words *without any other voucher*, in that case certainly referred to *value*. The Court considered it is a valued policy. But even in cases of valued policies an interest must be proved. But the difference between that case and the present is, That there the words introduced were not within the prohibition of the act; and here they are. I never saw an instance of an attack upon the statute so bold as this in the words of the policy: and though the word *policy* is not in that part of the statute, it must have meant to prohibit insurances of this description in the form of policies, the only form in which such contracts are made.

Giles, contra. Either *profits* are an insurable interest within the statute, or not: if not, the plaintiff cannot recover at all; if they be, then, like freight, though not within the words, they must be within the meaning of the stat. 19 Geo. 2, c. 37. And they were assumed to be so in *Grant v. Parkinson*. (b) [*Le Blanc, J.* Profits may be considered as part of the value of the goods on board.] It would have been a short answer to that case if *profits* had not been considered as within the statute. But there the clause in the policy upon which the question turned, was very different from this; for it did not stipulate that there should be no other proof of interest in the policy; but the stipulation was that there should be no other voucher of the profits being valued at 1000*l.* than the policy; *voucher*, therefore, referred to the quantum of value; and it is not sufficient here to say, that the plaintiff may recover if he prove an interest in fact; for the contract

1805.

HODGSON
against
GLOVER.

[320]

(a) Park on Insur. 395, 1st edit.

(b) Park, 305.

1805.

HODGSON
against
GLOVER.

[321]

on which he must recover is entire; and if void in part, is void for the whole.

LAWRENCE, J. here observed, That the stipulation as to the proof of interest was an independent part of the agreement of the parties, which might be void; and yet the other part of it, as to the contract itself of insurance, might be good. Here the parties first agreed that the profits of the adventure should be insured at a certain premium; and they have also agreed that less proof of the interest of the assured should be accepted than the law requires to be given. The latter stipulation is therefore void; because it is not competent to parties to make an agreement of that sort to bind a court of justice not to call for that proof which the law has made necessary: but still the contract of insurance itself may be good if proved by legal evidence.

Giles then objected, That the plaintiff had declared for a total loss; and it appeared that the greater part of the slaves had arrived safe at a market, and had been disposed of: and *non constat* but that there has been a profit upon that part of the voyage which was insured; though upon the whole voyage there may have been no profit. Then the plaintiff cannot recover as for a total loss: or the loss may have arisen from something not within the perils insured against, namely, the state of the market.

Richardson in reply, said, That there could be no average loss in a case of this sort, which was in effect a valued policy; but that it was sufficient to entitle the plaintiff to recover the whole sum insured if he proved an interest in fact in the adventure and a loss. That this resolved itself into the objection which was made in *Barclay v. Cousins* against the insurability of profits. That if no profits would have arisen, supposing the slaves had all arrived safe without any accident, and, therefore, that the loss must have arisen by something not insured against, that would have been a defence on the general issue: but here a peril within the policy is stated to have happened; in consequence of which, some of the slaves were in fact lost; and a loss is stated to have happened upon the profits of the whole adventure; which must, therefore, be attributed to the only cause which is stated,

[322]

Lord

LORD ELLENBOROUGH, C. J. At all events, the objection is decisive that the plaintiff does not shew that he has sustained a loss by the perils of the sea. He does not shew that if there had been no shipwreck, and the slaves had all got to a market, any profit would have been produced. It should have been shewn, that but for the peril insured against, which happened, there would have been profit upon the adventure.

GROSB, J. According to the plaintiff's argument, that there can be no average loss in a case of this sort, if he had obtained profit to within 20% of the whole interest insured, yet he might recover on this policy as for a total loss.

LAWRENCE, J. According to the plaintiff's own shewing, this is only an average loss. The case of *Barclay v. Cousins* did not go the length of deciding that the plaintiff was at all events entitled under a policy upon profits to recover to the full extent of the sum insured. What was there said, was only to shew the general insurability of profits; but the assured must still prove what in fact his loss was. But this case is defective in not shewing, that if there had been no shipwreck, there would have been some profit.

LE BLANC, J. The plaintiff here goes for a total loss. And [323] can we say that there has been a total loss where it appears that a great part of the cargo, the profits of which were insured against the perils of the sea, &c. got to the market, and we are not informed what profit it produced?

Judgment of nonsuit to be entered.

1805.

HODGSON
against
GLOVER.

1803.

Thursday,
Feb. 9th.

The KING against THOMAS PRICE, alias JOHN WRIGHT.

Upon an indictment for perjury in falsely taking the freeholder's oath at an election of a knight of the shire in the name of J. W. it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W. who swore to his freehold and place of abode; and that there was no such person; and that the defendant voted on the second day and was no freeholder, and sometime afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W. held That there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W. and consequently to find him guilty of the charge as alleged in the indictment.

AFTER a verdict of guilty, upon an indictment for perjury, and a rule *nisi* obtained in the last term for setting aside the verdict and granting a new trial, which was supported by *Erskine*, and opposed by the *Solicitor General*, *Garrow*, *Abbott*, and *Courthope*,

Lord ELLENBOROUGH, C. J. delivered the judgment of the Court in this term.

This was an indictment for perjury alleged to have been committed by the Defendant at the last election for *Middlesex*, and which was tried before me at the sittings after last *Michaelmas* term. The indictment states that the defendant appeared as a freeholder at the election on the 24th of *July*, and claimed to poll for Sir *Francis Burdett* (one of the candidates) in the name of *John Wright*. The he was required by the candidates to take the oath prescribed by stat. 18 G. 2, c. 18. That the oath was * administered to him in that name, and that he falsely swore "That he was a freeholder in the county of *Middlesex*, and had a freehold estate, consisting of an house, in the occupation of himself, lying or being at No. 8, *Bell Court, Gray's Inn Lane*, in the county of *Middlesex*, and that his place of abode was at No. 8, *Bell Court, Gray's Inn Lane*." Upon each distinct part of this oath, several perjuries were assigned; and the defendant was convicted upon all the assignments of perjury. A new trial was moved for, on the ground that there was not sufficient evidence to be left to the jury that the defendant *Price* claimed to poll, and took the freeholders' oath in the name of *John Wright*. That the freeholders' oath was administered to a person who polled on the second day of the election by the name of *John Wright*, and who swore to his freehold and place of abode in the term before stated; and that there was no such person, were fully proved. It was also proved (if he were believed) by a witness of the name of *Henry Britt*, that the defendant *Price* polled in the name of *John Wright*. This witness, however, discredited himself so much in the answers he gave upon his

cross-examination to some questions respecting matters collateral to the general subject of his testimony, that I thought, and so stated to the jury, that if they were of opinion that he meant to state what was untrue in those answers, he could not receive sufficient confirmation to set him up as a witness. I added, "But then you have the testimony of *Denby* (another witness) who is wholly unimpeached: if what he says be substantially true, you will consider his evidence." By *Denby's* evidence it appears clear that *Price* voted at *Brentford* on the second day of the election; that he was paid by one *Taylor*, who took down votes for Sir *Francis Burdett*; that the defendant said "*he had done the trick* (evidently meaning that he had given a false vote) and would do it again and again." That he afterwards in the evening of that day grumbled that *they did not pay him well enough for the job he had done*; and that when the circumstance of his having voted was mentioned to him, about two months or some considerable time afterwards, he said, *he was afraid he should be pulled for his bad vote*. The question for our consideration was, Whether, upon the testimony of this witness, supposing that of *Britt* to have been laid out of the case by the jury (and we have no means of knowing whether it were so or not) there were sufficient evidence left to the jury that *Price* polled and took the false oath as a freeholder (and which oath, he admits himself to have taken) in the particular name alleged in the indictment, *viz.* of *John Wright*: or whether he took the false oath, he admits himself to have taken, in the name of himself or some person other than *John Wright*, who was no freeholder? Now, according to the maxim of law, *De non apparentibus & non existentibus eadem est ratio*, as it does not appear to us by any evidence in the course of this trial that more than one false vote was given in the course of the second day's poll, we cannot assume that there was more than one so given; particularly too as every thing must be presumed to be *rite actum* where the contrary does not appear. And as we cannot presume that any other person committed the same crime on that day; and if there was only one false vote given on that day, this false vote, admitted by *Price* to have been on that day given by himself, must have been the same with that which was on that day given in the name of *John Wright*; upon the principle before

1805.

The KING
against
PRICE, alias
WRIGHT.

[325]

fore

1506.

The KING
against
PRICE, alias
WRIGHT.

[326]

fore stated, this intendment is inevitable. But this intendment was capable of being rebutted, as every *prima facie* intendment may, by contrary evidence. The defendant might have shewn not only that he voted in the name of himself, or of some person other than *John Wright*; but he might also have shewn that some other person, not having a right to vote, had voted on that day's poll; the intendment, as applicable to the individual case of *Wright*, would have been thus gotten rid of, viz. by shewing that there were two persons in the same predicament, i. e. of having been personated; and of course, that as the false vote of *Price* could not be referred to the case of the one individual with more certainty than to the case of the other, it could be properly referred to neither. The indictment, found at least six weeks before the trial, and removed by *certiorari* (of the contents of which therefore he was of course apprized) must have informed him of the specific terms of the charge imputing to him the taking a false oath in a particular name. He must also be presumed to have known, in point of fact, what he had declared to *Denby*, and to have known also, in point of law, how the conclusions resulting therefrom could be rebutted. He offered no evidence whatever, either by way of denial or explanation of the facts proved against him, or for any other purpose. Under these circumstances, it appears to us that the evidence of *Denby* (according to which the defendant admits himself guilty of perjury in and by a false vote given on the second day's poll) even unaided by that of *Britt*, but at the same time encountered by no contrary evidence, was competent to be left to the jury as that whereupon they might found a conclusion of guilty against the defendant, according to the particular terms in which the charge is made upon him by this indictment; and that the rule for a new trial should be discharged.

Rule discharged.

[327]

¶ The defendant was then ordered to be brought up for judgment on a subsequent day of the term, together with two other persons of the names of *Creese* and *Jenkins*, who had been convicted of similar perjuries at the same election: on which day sentence was passed upon them To be severally imprisoned in *Newgate* for one calendar month, and then transported beyond the seas for seven years.

But the Court afterwards, in the same term, upon reference to the particular wording of the stat. 18 Geo. 2, c. 18, which directs,

directs, that persons convicted of wilful perjury in taking the freeholder's oath, thereby appointed to be taken, "shall incur such pains and penalties as are (a) in and by two acts of parliament, the one made in the 5 *Eliz.* c. 9; the other made in the 2 *Geo.* 2, c. 25, contrary to the said acts;" and comparing it with the provisions of the stat. 5 *Eliz.* c. 6, s. 6 & 7, which direct, That any person convicted of the perjury therein described, shall forfeit 20*l.* and have imprisonment for six months, and be incapacitated as a witness; and if he have not 20*l.* shall be set on the pillory and have his ears nailed; and also with the provisions of the 2 *Geo.* 2, c. 25, s. 2, which enacts, That besides the punishment already to be inflicted by law for perjury, &c. it shall and may be lawful to order the person convicted to be imprisoned and kept to hard labour in the house of correction, &c. or otherwise to be transported for a term not exceeding seven years; being of opinion that the punishment inflicted by the acts of the 2 *Geo.* 2, was in this instance by the positive direction of the act of the 18 *Geo.* 2, made cumulative, directed the prisoners to be brought up again on the last day of the term; when Lord *Ellenborough*, C. J. stated the reason to be for the purpose of passing upon them a different judgment (which he observed might be done at any time within the same term) the former judgment being, in their opinion, improper, upon the grounds above alleged, and which were stated by his Lordship. After which

GROSE, J. calling to the prisoners, and stating that the Court had vacated the sentence pronounced upon them on *Saturday* last in this term, proceeded to pass sentence: That each of them, for his offence, should lose and forfeit 20*l.* and be imprisoned in *Newgate* by the space of six months, without bail or mainprize; and that his oath from thenceforth be not received in any court of record within *England* or *Wales*, or the marches of the same, until such time as this judgment should be reversed by attain or otherwise; and that after the expiration of the said six months, he be transported to such place beyond the seas as his Majesty, with the advice of his Privy Council, should think fit to direct and appoint, for the term of six years.

(a) The word *inflicted*, or the like, is here wanted in the printed statute to complete the sense, instead of the concluding words,

1805.

The KING
against
PRICE, alias
WRIGHT.

The punishments directed by the stat. 18 *Geo.* 2, c. 18, to be inflicted upon perjury in falsely taking the freeholder's oath at an election of a knight of the shire, are cumulative under the stat. 5 *Eliz.* c. 9, s. 6, and 2 *Geo.* 2, c. 25, s. 2, to which the first mentioned statute refers

[328]

Thursday,
May 9th.

DOE, on the Demise of TOONE and WEST, against COPESTAKE
and Another.

A devise to trustees of a reversion in land (after payment of debts, &c. which were found to be paid) to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should from time to time think fit to apply the same, is not a devise to charitable uses within the stat. 9 Geo. 2, c. 36; and therefore held, That the trustees were entitled to recover at law, however the Court of Chancery might afterwards direct the application of the trust fund.

IN ejectment to recover certain premises in the parish of *Foleshill*, in the city of *Coventry*, tried there the last Summer Assizes, a verdict was found for the Plaintiff, subject to the opinion of the Court, upon the following case:—

T. Faulkner being seised in fee of the premises in question, by his will of the 8th of *July*, 1795 (*inter alia*) * devised to *Hannah* his wife for life, his messuage and land, with the appurtenances, situate at *Alderman's Green* in *Foleshill*; “and after my wife’s decease, I will and devise the said messuage and premises to *G. Toone*, *F. West*, *R. Jackson*, and *W. Newton*, and the survivors or survivor of them, and their respective heirs or successors, in trust, that they the said trustees, the survivors or survivor of them, their respective heirs or successors, shall justly pay out of the said real estates the several legacies hereinafter mentioned, at the time and in manner hereinafter appointed for payment thereof; viz. 50*l.* within twelve calendar months next after the decease of my said wife, to such person or persons as she by her last will, &c. shall dispose of the same. *Item*, to *W. Smith*, 10*l.* *Item*, to *G. Sticklin* 5*l.* *Item*, to *W. Cantril* 5*l.* to be paid them respectively, within twelve months next after the decease of my said wife: and to enable the said trustees, the survivors or survivor of them, their respective heirs or successors, to discharge the several legacies, I do hereby will and order that they shall or may sell, mortgage, or otherwise charge the said message, &c. and premises; and the overplus or reversion of the said messuage, &c. and premises, after my said debts and legacies are so discharged, to be applied by the said trustees and the officiating ministers of the congregation or assembly of the people called *Methodists*, that now usually, or that shall for the time being, assemble at *Longford* in *Foleshill* aforesaid, and as they shall from time to time think fit to apply the same. To which purpose I will and desire, that when any two or more of my said trustees shall die, the survivors or survivor shall, from time to time, nominate or appoint others to fill up the number of the said trustees as
herein

* [329]

[330]

herein nominated. *Item*, I give all and singular my personal estate, of what nature or kind soever, subject to my just debts and legacies as aforesaid, unto *Hannah* my said wife, whom I nominate my sole executrix." *T. Faulkner* died without altering or revoking his said will, which was proved regularly in the register court of the Bishop of *Litchfield* and *Coventry*, in *April*, 1768. *Hannah Falkener* died in 1791. *G. Toone* and *F. West*, the lessors of the plaintiff, are the devisees named in the said will. *R. Jackson* and *W. Newton*, the other devisees, died before the action was commenced. The debts due from the testator, and the legacies given under his said will, were satisfied before the action was brought. The question for the opinion of the Court, was, Whether the plaintiff were entitled to recover? If he were, the verdict to stand: if not, the verdict to be entered for the Defendants.

1805.

DOED. TOONE
against
COPESTAKE.

Reader, for the plaintiff, contended, 1st, That this was not a devise to charitable uses within the stat. 9 Geo. 2. c. 36.; and, 2dly, That if it were so, yet the legal estate having passed to the trustees, they were entitled to recover at law. 1st, Admitting this to be a devise of the reversion of the reaulty to the trustees for the purpose mentioned, yet it is not void as a devise to charitable uses within the meaning of the statute; the uses in this case being indefinite, namely, such as the trustees and the officiating minister of the congregation shall think fit to apply the funds to. The application then being in the discretion of the trustees, they may apply the fund to other than charitable uses, to acts of benevolence and liberality which have been considered not to be charitable uses. (a)

[331]

Lord ELLENBOROUGH, C. J. The application in this case is left to the trustees still more indefinitely than it was in *Morice v. The Bishop of Durham*. They may build houses with it, or do what else they think fit; but (addressing himself to the defendant's counsel) what answer can be given to the other point, that the legal estate being given to the trustees, must rest with them; and they must be entitled to recover at law upon their legal title, in whatever manner the Court of Chancery may hereafter deal with their application of it.

Vaughan, Serjt. *contrà*. If this be a devise to charitable uses, the statute (s. 3.) avoids the legal estate, and not merely

(a) *Morice v. The Bishop of Durham*, 1 Ves. jun. 399, N. S.

1805.
 ———
 DON d. TOOME
 against
 CUPESTAKE.

[332]

the use ; and nothing now remains to be done but the ulterior application of the fund ; for the case finds that all the debts and legacies are paid. [Lord *Ellenborough*. It does not appear that they have been paid out of the rents or produce of the estate ; the trustees may have paid them out of their own funds, and then equity would not take away the estate from them till they were reimbursed out of it.] If the legal estate vest at all in the trustees, it is in fact a repeal of the statute. The Court will so expound the Act to repress the mischief which gave rise to it, and advance the remedy provided for it ; the mischief was the devising lands in mortmain, and creating perpetuities : which is here attempted by a provision for the perpetual succession of trustees. The remedy was to avoid all such dispositions in trust for “ *any charitable uses whatsoever*,” using the largest and most general terms as contra-distinguished from religious uses. The construction of “ *charitable uses*” in the stat. 43 *Eliz. c. 4.* goes much beyond the relief of the poor ; (a) the term extends, as appears by the preamble, to the repair of bridges, ports, highways, &c. and in *Jones v. Williams* (b) it was desired by the Lord Chancellor to be “ a gift to a general public use,” extending as well to the rich as to the poor ; and therefore a sale of land to be applied to water-works, for the use of the inhabitants of a town, was holden to be within the statute of mortmain.

LORD ELLENBOROUGH, C. J. This is nothing like a devise to charitable uses. The trustees may apply the estate to any use they think fit. The will of the testator does not aim at confining them to apply it to charitable uses. If I were to guess at his meaning, I should rather suppose that he meant them to apply it to superstitious and fanatical uses : it is left to their caprice : and unless we can say that it is a devise to charitable uses, it is not within the statute. The case recently decided by the Master of the Rolls is stronger than this.

Per Curiam,

Postea to the Plaintiff.

(a) Vid. 1 Bac. Abr. 590.

(b) Ambl. 651.

1805.

SAMUEL against JUDIN, in Error.

Tuesday,
May 9th.

THE Plaintiff below declared in his first count in *trover* for certain promissory notes. The second count stated, That whereas the plaintiff, at the special instance and request of the Defendant, delivered to him two other promissory notes (stating them both payable to the plaintiff) which said notes were indorsed in blank on behalf of the plaintiff, and were of the value of 2000*l.* to the intent that the defendant for certain commission and reward to be thereof paid by the plaintiff to the defendant, might procure the said notes to be discounted for the use of the plaintiff; and the defendant took and accepted the said two notes for the purpose aforesaid, and afterwards did procure them to be discounted, and thereupon received 1199*l.* as and for the discount of the said notes; nevertheless the defendant, not regarding his duty in this respect, but contriving and fraudulently intending to deceive and defraud the plaintiff in this respect, hath not, though requested, paid the said sum of money so by him received as and for discount of the said two notes to the plaintiff, but on the contrary hath converted and disposed thereof to his own use. The third count stated, that whereas the plaintiff at the like instance and request of the defendant, delivered to him two other notes (stating them as before) of the value of 2000*l.* to the intent that the defendant might raise and procure for the use of the plaintiff certain sums of money, or account with the plaintiff for the said notes, or for such sum of money as the defendant should raise or procure thereon; and the defendant thereupon took and received the said notes for the purpose last aforesaid; yet the defendant not regarding his duty in this respect, but contriving and fraudulently intending to deceive and defraud the plaintiff in this respect, hath not, though requested, accounted with the plaintiff for the said two last-mentioned notes, or either of them, or for any money raised or procured thereon; but hath wholly omitted and neglected so to do; therefore, &c. To this there was a general demurrer to the whole declaration and joinder. And the Court of C. B. (a) gave interlocutory judgment for the

A count stating that the plaintiff had delivered a note to the defendant to get it discounted, or account with the plaintiff for the money raised on it, and that the defendant received the note for that purpose, but intending to defraud the plaintiff, had not, though requested, accounted with him, &c. is laid in tort (whether formal or not in its frame) and not in assumpsit: and no objection can be taken upon a general demurrer to the whole declaration, because such count were joined with a count in *trover*. Error lies not upon an interlocutory judgment.

* [334]

(a) 1 New Rep. 43.

1805.

SAMUEL
against
JUDIN.

plaintiff to recover his damages by occasion of the premises, and awarded a writ of enquiry to assess the damages on which the jury found several damages; viz. 201*l.* 14*s.* and costs on the first count, and nominal damages on each of the other two; which latter the plaintiff remitted, and prayed judgment for his damages on the first count, which was entered up accordingly. And now on a writ of error brought, it was assigned for error that there was a misjoinder of action: for that the first count of the declaration was in *trover*; and in the second and third counts the plaintiff declared on certain supposed causes of action founded upon breaches of certain promises and undertakings supposed to have been made by the defendant to the plaintiff.

[335] *Wood*, for the plaintiff in error, said it was not necessary to cite cases to shew that counts in *trover* and *assumpsit* could not be joined in the same declaration: and contended that the two last counts, though not in terms, were in effect laid in *assumpsit*. The last count was upon an implied agreement by the defendant below to account to the plaintiff for money raised on certain notes delivered to him; and the breach was for not accounting; in other words, for not performing his promise; for the count must necessarily imply an *assumpsit* from the facts stated. [Lord *Ellenborough*, C. J. How are these counts laid in *assumpsit* more than the counts in *Dickson v. Clifton*, (a) and *Govett v. Radnidge*, (b) which were holden to be laid in *tort*?] In those cases there was an actual misfeasance arising from a tortious negligence: but though the not accounting may be a breach of duty, because it is the duty of every man to keep his promise, yet a mere negative act cannot be converted into a *tort*, otherwise every default of payment for goods sold and delivered may be laid in *tort* which will blend in confusion distinct forms of action. The Court of C. B. seemed to think, that if any one count was good, the plaintiff was entitled to judgment. [*Le Blanc*. The demurrer was general to the whole declaration, and not to the particular counts, which you say are informal. *Lawrence*, J. The only question we have to consider is, Whether the two last counts as laid, are in *assumpsit* or in *tort*? not Whether they are properly laid in *tort*? Now there is no

(a) 2 Wils, 319,

(b) 3 East, 62.

promise, nor breach of promise alleged, but the whole is laid in *tort*. If those counts are informally laid in *tort*, the demurrer should have been pointed to them specially, and not have been made generally to the whole declaration. *Le Blanc, J.* As the two last counts are laid, *non assumpsit* could not have been pleaded to them.] Supposing the two last counts to be had in point of form, the interlocutory general judgment given in C. B. is erroneous. In *Bage v. Bromuel*, (a) where *trover* and *assumpsit* were joined, and there was a verdict for the defendant *quoad* the *trover*, and for the plaintiff *quoad* the *assumpsit*, the judgment was arrested, notwithstanding the severance by the jury.

1805.

SAMUEL
against
JUDIN.

[336]

Lord ELLENBOROUGH, C. J. Error can only be brought on final judgment. And here are several damages found on each count, and the damages on the two last counts remitted, and general judgment only for the damages on the first count; which is right, unless it could be shewn that the two last counts are laid in *assumpsit*, so that they could not be joined with the first count in *trover*; which you have failed to do. Therefore

Per Curiam,

Judgment affirmed. (b)

Bayley Serjt. was to have argued in support of the judgment below.

(a) 3 Lev. 99.

(b) Vide *Brown v. Dixon*, 1 Term Rep. 274.

LEWIS, on the Demise of JOHN ORMOND against WATERS and THOMAS. Friday, May 10th.

IN ejectment for a messuage, tenement, and lands, called *Treslin*, in the parish of *Llandowry Velfrey*, in the county of *Pembroke*, in the occupation of the Defendant *Thomas*, as tenant to the other defendant *Waters*, which * was tried before *Lawrence, J.* at the last *Hereford* assizes, a verdict was taken for the Plaintiff, subject to the opinion of the Court, on the following case:

Under a devise to D. O. the testator's eldest son for life, remainder to trustees, &c. remainder to the first and other sons of his said eldest son and their

heirs, and for want of such issue to the testator's second son, J. O., &c. with like remainders to his first and other sons; and for want of such issue, to the testator's own right heirs; held, that the first and other sons of D. O. the eldest son took estates tail in succession, and consequently the remainders over vested, and were not contingent and defeated upon the event of D. O. having a son, who died in the lifetime of D. O. and therefore that D. O. having died without any son living at his death, but leaving daughters, a son of J. O. was entitled to take in preference to such daughters of his elder brother.

* [337]

David

1806.

—
 LEWIS d.
 ORMOND
 against
 WATERS.

David Ormond, Gent. being seised in fee of the said premises, by the will dated 23d of *April*, 1763, after giving the same to his wife *Elizabeth* for life, during her widowhood, devised the same as follows:—"I give and devise the same lands and premises to *David Ormond*, my eldest son and heir apparent, for life, without impeachment of waste; remainder to *L. E.* and his heirs, during the life of my said eldest son, to preserve contingent remainders; remainder to the first and other sons of my said eldest son, and their heirs; and for want of such issue, to my second son *John Ormond* for life, without impeachment of waste; remainder to the said *L. E.* and his heirs, during the life of my said son *John Ormond*, to preserve contingent remainders; remainder to the first and other sons of my said second son and their heirs; and for want of such issue, to the use of my own right heirs for ever." The testator *David Ormond* died on 25th of *April*, 1763, leaving his widow *Elizabeth* and two sons, the said *David* and *John* him surviving. On his death *Elizabeth* his widow entered and continued in possession of the premises till 1778, when she died. *David Ormond*, the eldest son, then took possession of the premises. He had two sons, *William* and *David*, both of whom were born after the decease of the testator, and died in their father's lifetime, (*William* at the age of about eight months, and *David* aged four years) and four daughters, namely, *Ann*, *Elizabeth*, *Margaret*, and *Rachel*, who survived their father, and are all now living; and one of them is the wife of the defendant *Waters*. *David Ormond* the son died in *April*, 1804; *John*, the second son of the testator, died in 1769, leaving *John Ormond*, the lessor of the plaintiff, his son and heir, who was born on the 4th of *February*, 1761. The question for the opinion of the Court was, What estate, if any, the lessor of the plaintiff took in the premises in question?

[338]

Dauncey, for the plaintiff, after stating the question to be, Whether the first and other sons of the testator's eldest son *David Ormond* took in fee or in tail? that if in tail, the remainder to *John Ormond*, the second son was vested: if in fee, then such remainder was contingent, and was defeated by the event of *D. O.* having had sons; contended, that the first and other sons of the eldest son took only in tail.

This

This is a question of intent, to be collected from the whole of the testator's will; and the Court will adopt that construction of the words by which such intent can be best effectuated; and in so doing, will make a particular and subordinate intent give way to the general and principal intent, where both cannot take effect. Now here the principal intent was, that in default of issue male of the testator's eldest son *David*, the estate should go to his second son and his issue male; and in order to effectuate that, it is necessary that the first and other sons of *David*, the eldest son, should take estates tail; and this is warranted by the words used. It is plain that the testator looked only to the male descendants of *David* in the first instance: for he only mentions sons, and omits daughters; and the limitations to the second son, and to his first and other sons, which immediately follow, manifest the same intent according to the rule of *noscitur a sociis*. Next, it appears clearly to have been the testator's intent that the sons of his eldest son *David* should take in succession; for the limitation is to the *first* and other sons; that is always understood according to priority of birth. If he had meant *all* the sons to take together, he would have said, "to *each and every* of the sons," or "to *all* the sons," or at least "to *the* sons." *Evans v. Astley*, (a) and *Ungly v. Peale*: (b) and this is the universal language of marriage-settlements, where a limitation to first and other sons is always used to denote estates in succession. But then it will be said, that the limitation is to the first and other sons of *David* and *their heirs*, which shews an intention to give them a fee; but the meaning of the word *heirs* is restrained by the subsequent words, "and for want of *such issue*," to *heirs of the body*. The word *issue* conveys an intention to give an estate tail to some person; it is as operative to pass such an estate in a will, as *heirs of the body* are in a deed. *Doe d. Barnard v. Reason*, (c) and *Ginger v. White*; (d) and here the grammatical construction which refers *such issue* to the last antecedent *heirs*, will best effectuate the general intent. *Idle v. Cook*, (e) *Goodright d. Lisle v.*

1805.

LEWIS d.
ORMOND
against
WATERS.

[329]

(a) 3 Bar. 1570.

(b) 8 Vin. Abr. 50.

(c) Cited at large in *Doe v. Holmes*, 3 Wils. 244.

(d) Willes, 353.

(e) 1 Pr. Wm. 76.

1805.

LEWIS d.
ORMOND
against
WATERS.

[340]

Plin. (a) *Evans v. Astley.* (b) Again, there could not be a want of *heirs* of *David*, the eldest son, or his sons, while *John Ormond* the second son of the testator, or any of his issue were living; which also shews that by the *heirs* of *David's* son must have been meant *heirs of the body.* *Ives v. Legg,* (c) *Beck's case,* (d) *Law v. Davis,* (e) *Goodright v. Goodridge,* (f) *Webb v. Hearin,* (g) and *Nottingham v. Jennings.* (h) Then the ultimate remainder to the *right heirs* of the devisor was intended to let in the daughters of his two sons in succession, in default of their heirs male. He then referred particularly to *Lady Dacre v. Doe*, in *Error*, (i) to shew that the words, "for want of such issue (*i. e.* heirs male of the eldest son *David*) to my second son," did not make the remainder to the second son to depend on the contingency of there being no son of *David* born, but that *John* the second son took a vested estate for life, and that his eldest son took a vested estate tail, which took effect in possession on the death of *David*, without leaving issue male: and to *Doe v. Halley*, (k) where *Lawrence, J.* pointed out the inconvenience of a contrary construction; and he said, that this was the more natural construction, since at the time of making the will, and till after the death of the devisor, *David* had no sons, but *John* had a son.

Abbott, for the defendants contended, That *John Ormond*, the second son, took only a contingent remainder for life, to vest if *David* his eldest brother should die without having any son: but which in the event did not vest, because *David* had sons; and, consequently, that the subsequent remainders to the first and other sons of *John* were also contingent and defeated; and that the daughters of *David* were entitled as the heirs of *David's* sons. It does not appear that the devisor meant that the sons of *David* should take only estates tail, and not in fee; for if they took in tail, they would take estates in tail general and not in tail male; for there is nothing to limit the word *heirs* to heirs male, even though it were construed *heirs of the body*; and this shews

[341]

(a) 2 Stra. 729—31, 2.

(b) 3 Burr. 1582.

(c) Cited in *Doe v. Perryn*, 3 Term Rep. 488.(d) Lit. Rep. 159, 253, &c. Also reported in Cro. Car. 363, under the name of *Boretton v. Nicholls*: and in *Fearne's Cont. Rem.* 514.

(e) 2 Stra. 849.

(f) Willes, 369.

(g) Cro. Jac. 415.

(h) 1 Pr. Wms. 23.

(i) 8 Term Rep. 112.

(k) Ib. 5, 12.

that

that the devisor did not mean particularly to prefer the male line; which distinguishes this case from those which have been cited; and it is distinguished from them in another respect, namely, the introduction of trustees to preserve contingent remainders, after each of the estates for life. *Evans v. Astley* (a) turned on the construction of a very long will, where the Court could take one part in aid of the construction of another; and the intention of the devisor that his afterborn sons should take estates in tail male, though there were no express limitation of the sort, but only an inference of such an intent from a general limitation over, "for want of such issue," was manifested by preceding limitations of the like nature to his other sons then in *esse*, and also by subsequent similar limitations. In *Ives v. Legg* (b) the question turned on the meaning of the words "in default thereof," which the Court held to refer to the whole antecedent sentence, and to take in all the contingencies which could happen. But here the words are "for want of such issue," and, therefore, necessarily confined to the want of issue of some person, and clearly refer to the sons of *David*. *Doe v. Halley* (c) was the case of a limitation to the testator's nephew *M. H.* for life, remainder to the eldest son of his nephew to be begotten, and to the *heirs* of such eldest son; and in default of *issue male* of his *said nephew*, to another nephew *S. B.* There it was necessary that *M. H.* should take an estate tail, for otherwise a second son of *M. H.* could have taken nothing, though it was plain from the words that *S. B.* was not to take till default of issue male of *M. H.* In *Ungly v. Peaie* (d) the word *successive* was introduced, on which the judgment turned: but here, for want of that word, all *David's* sons must take together, and not in succession. Though even if the eldest son alone were to take, yet as the limitation is to the heirs of the taker, he would take in fee, and the remainder over would be equally defeated. To entitle the plaintiff to recover, he must make out that "first and other sons" do not mean *all*, but "one after another," and that *heirs* means "heirs of the body;" and *their heirs*, the "heirs of the body of each in succession;" and that "for want of such issue," refers to issue of the sons of *David*,

1805.

LEWIS d.
ORMOND
against
WATERS.

[342]

(a) 3 Burr. 1582.

(c) 8 Term. Rep. 5.

(b) 3 Term Rep. 488, note.

(d) 8 Vin. Abr. 49.

1805.
 ———
 LEWIS d.
 ORMOND
 against
 WATERS.

[343]

and not of *David* himself. If, instead of the word *issue*, it had been “and for want of such *heirs*” then to *John Ormond*, &c. it might have been more easy to contend that *heirs* there meant “*heirs of the body* ;” for the sons of *David* could not die without *heirs*, if their uncle or cousins to whom the limitations over were made were living. But the natural construction of words must always prevail, unless there be a manifest intention to the contrary: and the word *heirs* does not naturally mean *issue*, but *heirs general*: and nothing could be inferred as to the intention of the devisor from the circumstance of *John* having a son born at the time of making the will; because the limitation to the sons of *John* is in the same words as that to the sons of *David*, who had then no sons born: and, on the contrary, if he had meant that the son of *John* should at all events take a life estate, he might have given it to him. And he referred to *Goodright v. Dunham*, (*a*) *Keene d. Pinnoch v. Dickson* (*b*) and *Doe d. Comberbatch v. Perryn*, (*c*) to shew that the limitation over to *John* and the subsequent limitations were contingent, to take place only upon the event of *David* the eldest son having no sons, and that he having had sons, those estates were defeated.

Damncey, in reply, observed, That the interposition of trustees to preserve contingent remainders proved the solicitude of the devisor to guard the limitation which he had created. That the limitations to “the *first* and other sons” here, shewed the intention of the devisor that they should take in succession as plainly as if he had used the word *successively*, the introduction of which it was admitted would have made all clear. As to *Goodright v. Dunham*, he answered, that the limitation over to the daughters was, “in case he dies without issue,” which evidently meant *J. Laming* the son: and the prior devise was to him for life; and after his death to “*all and every* his children *equally*, and to their *heirs* ;” and, therefore, they were plainly meant to take the fee, and consequently the limitation over must be contingent. In *Keene v. Dickson*, which was very different from the present, the limitation over to the daughters was “for want of such *issue male* ;” and the construction there adopted was to effectuate the intention of the devisor, which was, that the estate should not go over to another

(*a*) Dougl. 264. (*b*) 1 Bos. et Pull, 254, note. (*c*) 4 Term Rep. 484.

family till after a general failure of issue of the *Pinnocks*, which would otherwise have been defeated for want of a limitation to the issue of the daughters. Then the case of *Doe d. Comberbatch v. Perryn* is distinguishable in several respects; first, The devise there was to *all and every* the children, equally to be *divided* amongst them *share and share alike*; but this is to the *first and other sons*, which shews they were to take in succession. Secondly, The limitation there was to the children and *their heirs for ever*; which more strongly indicated than here an intention to give the children an estate absolutely: but here the words *for ever* do not occur till the last limitation to his right heirs. Lastly, The devise over was upon the decease of the first takers *without issue as aforesaid*; which designated expressly to whom those words were referable.

LORD ELLENBOROUGH, C. J. If upon looking into the cases cited we have any doubt, we will say so in the course of the Term; but at present it appears to me that the intention of the devisor is clearly to be collected. After giving his widow a life estate, he devises the estate to his eldest son *David* for life, remainder to trustees, &c.; and then follows the limitation to the "*first and other sons*" of *David*; by which expression he appears to me to have denoted that the sons should take *successively*, as plainly as if that word had been used. Otherwise, if he had meant that all the sons should have taken together, he would have used the words "*all and every*," as in *Doe d. Comberbatch v. Perryn*, or other analogous expressions. Then he gives it to the first and other sons and *their heirs*: that would have carried the fee: but then follow the words, "*and for want of such issue*;" and the question is upon the reference of the word *issue*, Whether it refer to *David*, or to his first and other sons? and it appears to me by the context to mean *for want of issue of such first and other sons*; and this construction will restrain the word "*heirs*" to mean "*heirs of the body*." And it may be observed that the words *for ever* (to them and their heirs *for ever*) do not occur in this place as they did in some of the cases cited. Then the devise will be the same as if it had been in terms to the first and other sons of *David* in tail, remainder to *John Ormond*, &c. which will give him a vested remainder; and this will effectuate the apparent

1805.

LEWIS d.
ORMOND
against
WATERS.

[344]

1805. intent of the devisor to continue the estate in his family :
 which would be defeated by referring the word *issue* to
David ; and to construe it otherwise would be to give the word
issue a different sense than what the subsequent words import
 it to mean.

LEWIS d.
 ORMOND
 against
 WATERS.

GROSE, J. The limitation to “ the *first* and other sons,” imports that they were to take *successively* according to priority of birth ; it is the abridged language of conveyances : and then the words “ for want of *such issue*,” referring to the antecedent limitation to the first and other sons of *David* and *their heirs*, will give them estates tail according to all the cases, and will vest the remainder to *John Ormond*, the brother of *David*.

LAWRENCE, J. I do not know whether, on looking into all the cases which have been cited, some of which I have not on this occasion referred to, they may alter the opinion I have formed ; for many of them run so near each other, that it is impossible to carry their distinctions in any common memory ; though Lord *Kenyon* was enabled to do so beyond any other man in my experience. But as at present advised, I think that the sons of *David* took estates tail, and that the remainders over vested. The limitation is to “ the *first* and other sons,” and *their heirs*, and, for want of *such issue*, remainder over : and the question is, Whether the words for want of *such issue*, means *first and other sons*, or *their heirs* ? if it mean the latter, the sons took estates tail ; for the sons could not take estates in fee successively in remainder one after another : and I do not think that the testator meant to make the grandsons joint tenants in fee, as he has not so given the estate to his own sons ; and as the effect of that would be to give a benefit of survivorship, by which an infant eldest son would lose all share of the estate if his father happened to die before the jointure was severed. The testator certainly did not mean, while there were any descendants of his sons, that the limitation to his own right heirs should have any effect.

[346]

LE BLANC, J. The person who drew this will, seems to have had some knowledge of law ; but an imperfect knowledge of it. By making use of the phrase “ *first* and other sons,” he meant that the sons should succeed to the estate according to seniority ; though he improperly gives it to them

them and *their heirs*. But he afterwards explains what he meant by the word *heirs* by the subsequent words, “and for want of *such issue*,” namely, “*heirs of the body*.” That it may have that meaning is clear from many cases; and the only question which can be made, is, Whether this testator intended so? And I think that he meant to give the estate to the sons of *David successively* in tail, beginning with the eldest son and the heirs of his body, remainder to the second son and the heirs of his body, and so on; remainder to the devisor’s second son *John*, &c.; and consequently that the remainders over vested.

Postea to the Plaintiff.

1805.

LEWIS d.
ORMOND
against
WATERS.

[347]

Monday,
May 13th.

Ex parte CHIFFENCH.

MORRIS moved for a *mandamus* to the marshal of the King’s Bench prison, commanding him to insert in his list and bring up an insolvent debtor to the next Sessions, in order that he might be there discharged under the last Insolvent Debtors’ Act, of the 44 Geo. 3. c. 108. the 1st section of which requires every keeper, &c. of any prison to make a true list of every person who, upon the 1st of *January* 1804, was and has since continued, &c. an actual prisoner in his custody by reason of any debt, &c. And by s. 2. the marshal of the K. B. prison, and every other gaoler, &c. shall swear to his list. And then the 4th sect. enacts That “every person who on the 1st of *January* 1805, was in any prison or gaol, and has since so continued, &c. for the non-payment of any debts, damages, or sums, &c. of money, which did not in the whole on the said 1st of *January* 1804, or at any time or times since amount to a greater sum than 1500*l.*, and whose name shall be inserted in any such list to be delivered in as aforesaid, taking the oaths, shall be for ever released and discharged,” &c.

One who was charged in custody on mesne process for a sum exceeding 1500*l.* on the 1st of *January* 1804, is not entitled to be discharged under the Insolvent Debtors’ Act of the 44 Geo. 3. c. 108. tho’ the debt was afterwards reduced by verdict to a sum which, together with the costs, did not amount to 1500*l.*

This was moved on an affidavit, stating, that the party was indeed in custody on mesne process on the 1st of *January* 1804, for a larger sum than 1500*l.*: but that since that time the amount of the debt had been reduced by verdict to a less sum, together with the costs, than 1500*l.* But

The

1805.

Ex parte
CHIFFENCH.
[348]

The Court said, that as the defendant was legally charged in custody on the 1st of *January* for a sum beyond 1500*l.* within which the relief afforded by the legislature was expressly limited by the words of the Act, there could be no authority for bringing him up to be discharged, and therefore they

Refused the Rule. (a)

(a) The same construction was put upon the statute in another case in the following term.

Tuesday,
May 14th.

KING against FRASER.

Debt lies for use and occupation generally, without stating the place where the premises lie, of any of the particulars of the demise.

[349]

THE Plaintiff declared in debt for use and occupation, and stated, that whereas the Defendant on the 3d of *September* 1804, in *London*, to wit, in the parish, &c. was indebted to the plaintiff in 20*l.* for the use and occupation of a certain messuage and premises by him the defendant, and at his request, and by the permission of the plaintiff, for a long time before then elapsed, used, occupied, &c. and enjoyed, whereby, &c. To this there was a demurrer, assigning for special cause, that it is not stated, nor can be collected from the said count, where the messuage or premises in respect of the supposed occupation of which the money is claimed are situated, so that the defendant cannot know upon what ground, or against what title or claim he is to defend himself; whether the claim against him be as the actual occupier, or as the tenant of premises which he may have under-let to others; nor, by reason of the uncertainty of the description, does he know what claims or set-off he may have for land-tax, &c. And for that the sum is not demanded as *rent*, for which debt will properly lie. Nor is there any demise or contract in respect of the premises laid. And for that there is no particular period stated within which the sum claimed (which if demandable at all must be as *rent*) became due. And for that a recovery in the present action could not be pleaded in bar to another action for rent without averments and matter *dehors*, which, as being matter of record, ought not to be required; and which, if the situation of the premises

mises and period when the rent become due were stated, would not be necessary. Joinder in demurrer.

Espinasse, in support of the demurrer, relied upon the special causes above assigned; and insisted that as the action of debt for use and occupation was substituted for the ancient method of declaring in debt for rent, it ought so far at least to follow the former precedents as to describe the place where the premises are situated, by reason whereof the rent accrued: as in *Rast.* 152, 176. *Lev. Entr.* 52. 1 *Lill. Entr.* 185, and *Clift's Entr.* 237, and all other precedents in debt for rent; and which was holden to be necessary in *Buckland v. Otley*, (a) and in *Grobham v. Tornborough*; (b) and accords with *Gilb. on Debt*, 404, &c. and 5 *Com. Dig.* 220, tit. *Pleader*, 2. W. 14; and with the rule in the same book, 23, tit. *Pleader*, C. 20, that a certain place ought to be alleged where every fact material and traversable was done. And this action being founded upon a contract for land, the locality of the demand ought to be certainly alleged. And, he said, that in *Wilkins v. Wingate*, (c) though the Court held upon the authority of a late case in C. B., (d) that it was not necessary in the present form of action to set forth the demise, nor entry of the lessee, nor the time when the rent became due,—yet there the place where the premises were situated was stated in the declaration to be at *Bath*, in the county of *Somerset*, as appeared by one of the briefs in the cause, to which he referred. And this, he observed, was the most important fact to allege, as when the place was stated, the tenant must be presumed to know what the rent reserved was, and the times of payment: but here it is only stated that the defendant was *indebted* in *London*, not that the premises were situated there.

Wigley, *contra*, said, That though this question might not arise in the last mentioned case, yet it was there holden that debt for use and occupation would lie: and if such general form of declaring be good in one respect, there is nothing in reason to distinguish that case from the present. The objection is reduced to a mere question of *venue*; and if it were necessary to lay the premises in any particular parish, they must be taken to be in *London* where the *venue* is laid, and where the defendant is alleged to be *indebted* to the plaintiff.

(a) Cro. J. 683.

(b) Hob. 82.

(c) 6 Term Rep. 62.

(d) *Stroud v. Rogers*, Hil. 32 Geo. 3. cited *ibid*.

1805.

KING
against
FRASER.

[350]

1805. And as to the case in *Hob. 82*, there must be some mistake in saying that the want of *venue* was holden by the defendant's confessing the lease; for the *venue* was laid in *London* upon a lease of lands in the county of *Southampton*, not stating in what place; the objection therefore was to the want of *description*, and not of *venue*. There is no more reason here for requiring a place to be stated where the lands lie, than in debt for goods sold and delivered, to state the place where the contract was made, or the goods delivered; which is never done. And there is no more inconvenience in this than in any other case of general pleading; and that may always be obviated by calling for a bill of particulars. And he referred to the authorities collected in Mr. Serj. Williams's note (2.) to *Thursby v. Plant*, 1 Saund. 233, to shew that this general mode of declaring is sufficient.

[351]

Lord ELLENBOROUGH, C. J. When it was once established as in *Stroud v. Rogers*, and *Wilkins v. Wingate*, that debt for use and occupation would lie, it necessarily followed that the generality of the form of declaring for use and occupation in every respect might be adopted. And if this objection could prevail, it would apply as well to counts in debt for goods sold and delivered, and for work and labour; for the sale and delivery in the one case, and the work and labour in the other, must take place and be done in some given place; but the place not being essential to be stated in those cases, it has never been required: and there is no more reason in this case for saying that the place where the premises lie is material to be laid. And as to the inconveniences to the tenant, which are pointed out by the causes of demurrer alleged, they may be gotten rid of, by calling for particulars of the plaintiff's demand: or if another action for rent be brought, he may by proper averments in his plea shew that the plaintiff had before recovered the same rent in an action for use and occupation, of the same premises. It is sufficient therefore that there is as much particularity in this as in other cases to which I have alluded.

GROSE, J. I am sorry to see these experiments repeated in varying from the usual and approved method of pleading; but the question is, Whether any injustice or inconvenience arise from not stating the particular place where the premises lie? And I am not aware of any which may not be obviated

[352] by the modern practice of obtaining the particulars of the plaintiff's

plaintiff's demand, by which if the defendant be desirous of information he may be truly informed where the lands lie, for the use and occupation of which the plaintiff seeks to recover. And if the defendant be sued again for the same rent, he may shew it by pleading in the manner suggested by my Lord. Therefore, in analogy to the general mode of declaring in *assumpsit* for use and occupation, and as it tends to encourage brevity of pleading, and is not attended with any real inconvenience to the party sued, I am inclined to support the declaration.

LAWRENCE, J. There is no more inconvenience in the mode of declaring in this than in other instances which have been mentioned; and whatever that may be, it may be removed by the defendant's calling for the particulars of the demand. It has been the common form of these counts to describe the place where the premises lie: but it would be sometimes inconvenient to require it, as if it be doubtful in what parish they are situated, where they are on the confines of two parishes. In that case the plaintiff might be turned round upon a false description. The case has been argued by the defendant's counsel as if this were an action founded upon locality; but no authority has been cited to shew that an action for use and occupation is a local action. If a party have enjoyed the use and occupation of land in *Kent*, that is a good consideration for a promise in *Middlesex*, and he may afterwards be sued there. Lord Coke even says, (a) that in debt, if a man declare on a lease for years in one county of land in another county, he ought to bring his action where the lease was made, and not where the land lies; for the action is grounded on the contract. But perhaps that is not necessary; and it may be sufficient to bring the action in the county where the premises lie. (b) So here, where a promise is made in one county to pay rent for lands in another, the action may be brought in the former. It does

1805.

 KING
 against
 FRASER.

[353]

(a) Bulwer's case, 7 Rep. 2. So F. N. B. 146, E. "The writ of covenant ought to be brought where the covenant was made," &c. And vi. 5. Com. Dig. 295. But by Fitz. Abr. Covenant, 9, which cites T. 26 II. it appears that the lessor may bring covenant either in the county where the land lies, or in that where the lease was made.

(b) Dy. 40, a, says, "If a man lease land in Middlesex, which land lay in Essex, rendering rent, an action of debt lies either in the one county or the other; because there is a continual privity between the lessor and lessee."

1805.
 KING
 against
 FRASER.

not appear by the case in *Hobart* whether that were an action by the assignee of the reversion: if it were, it ought to have been brought in the county where the lands lie. Before the stat. 16 & 17 Car. 2. c. 8., (a) if the question could have been raised whether the premises lie in the county where the action was brought, it might have been a material fact to allege where the premises lie; but it cannot be necessary now since that statute. Upon the whole, therefore, the reason of the ancient precedents referred to does not apply to this case; there is no locality in this action; and no advantage lost to the defendant by the omission complained of; and after the cases of *Stroud v. Rogers* and *Wilkins v. Wingate*, determining that debt for use and occupation generally will lie, there is no objection to this form of declaration.

[354]

LE BLANC, J. I should not be disposed to make any great stretch in support of the action where there has been an omission of this sort, because it is always to be wished that precedents should be abided by. But when the Courts got rid of the necessity of pursuing the old remedy of debt for rent, all the strictness required in that form of action was also gotten rid of. In *Stroud v. Rogers*, the Court of Common Pleas held that a declaration in debt, not setting forth any demise of the premises, nor for what term, or at what rent they were demised, nor how long the defendant had occupied them, nor when the sum claimed to be due for the use and occupation of them became due, nor for what space of time, was yet sufficient to enable the plaintiff to recover for use and occupation. The particular place indeed where the premises lie was there mentioned; but I have no doubt that if that also had been omitted, the judgment of the Court would have been the same. That case was holden to be an authority for the like determination by this Court in *Wilkins v. Wingate*. Then, after getting rid in this form of declaring of the strictness which had been observed in all other particulars in the old declaration in debt for rent, there is no reason for retaining the place where the premises lie; especially as it may sometimes be

(a) By that statute judgment shall not be arrested after verdict for want of a right venue, so that the cause were tried by a jury of the proper county where the action is laid.

used to turn the plaintiff round; and as every inconvenience suggested may be removed by having the particulars of the plaintiff's demand.

Judgment for the Plaintiff.

1805.

King
against
FRASER.

[355]

HOPKINS *against* LLOYD.

Wednesday,
May 15th.

OWEN moved on the usual affidavit for a rule *nisi* for changing the venue from *London* to *Cardiganshire*; which rule was at first granted in the form prayed: but *The Court* having been furnished by the Master with the following note, Lord *Ellenborough*, C. J. said that the practice appeared now to be sufficiently established for changing the venue from an *English* to a *Welch* county, to grant the rule absolute in the first instance.

Rule absolute in the first instance for changing the venue from an *English* to a *Welch* county, on the usual affidavit.

“*Hughes v. Hughes*, *Hil.* 40 *Geo.* 3. On a motion to change the venue from *London* to *Denbigh*, the question was, Whether there should be a rule to shew cause, or whether the rule should be absolute in the first instance? Lord *Kenyon*, C. J. said that it had been so frequently changed from *London* to *Wales*, that he thought it might be absolute in the first instance; and it was so taken.”

1805.

Thursday,
May 16th.

The KING against The Corporation of the BEDFORD Level.

The stat. 15. Car. 2. c. 17. creating the corporation of the Bedford Level, directs that they shall appoint a registrar, &c. and other officers, at their pleasure; the duty of which registrar is to register titles to land within the Level, and he takes an oath of office: held, 1st, That an information in nature of *quo warranto* does not lie against such an officer, he being a mere servant of the corporation, and his office not affecting any franchise or other authority holden under the Crown.

And the corporation having at the request of the registrar elected a deputy registrar, held, 2dly, That the latter

officer must be considered as much a deputy of the principal registrar as if nominated by him. 3dly, That however such deputy were properly or not constituted in the first instance, yet his authority necessarily expired on the death of his principal. 4thly, That, however the acts of a legal deputy to a ministerial officer may be good after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a colour of authority, yet that the titles of land owners within the Level, registered by the deputy after the death of his principal was known, were invalid. 5thly, That the persons whose titles were so illegally registered, had no authority under the Act of Parliament to vote at the election of a new registrar. 6thly, That upon affidavit, that one of two candidates for the office had a majority only by means of such illegal votes, the Court granted a *mandamus* to the corporation to admit and swear the other, who appeared upon the affidavits to have the greater number of legal votes; and this, although the first was admitted and sworn into the office; there being no other specific, or at least no other such convenient mode of trying the right.

* [357]

respective

A RULE had been obtained, calling upon the governor, bailiffs, and commonalty of the company of conservators of the Great Level of the Fens to shew cause why a writ of *mandamus* should not issue to them, commanding them to admit and swear *Edward Christian*, Esq. into the place and office of registrar of the said corporation.

By stat. 15 Car, 2. c. 17. s. 2. the Earl of *Bedford* and others, who had commenced the drainage of the Great Level, were incorporated by the name abovementioned; and the corporation is to consist of a governor, six bailiffs, twenty conservators, and commonalty, who are to meet together "when, where, and as oft as they please, and appoint a registrar, receiver, one or more serjeants at mace, and other officers, and allow them salaries, and remove them, and make new at their pleasure." By s. 15. the governor, bailiffs, and conservators are to be elected yearly upon *Wednesday* in *Whitsun* week. By s. 8. all conveyances by indenture within * the Level, "entered with the said registrar in a book to be kept for that purpose, shall be of equal force to convey the freehold and inheritance, &c. as if inrolled, &c. and no lease, grant, or conveyance, &c. shall be of force but from the the time it shall be entered with the said registrar as aforesaid: the entry whereof being indorsed by the said registrar upon such lease, &c. shall be as effectual in law as if the original book of entries was produced at any trial," &c.; and by s. 14. "the governor, bailiffs, conservators, registrar, receiver, or other officers nominated as aforesaid, and every other from time to time into any of the

respective offices to be chosen," shall take a certain oath of office. It was stated in the affidavits, That for above a century back, a deputy registrar had at intervals been elected, as it seemed by the corporation, though the Act of Parliament does not mention any such officer in terms : and thirty-seven instances were stated of such annual elections of the same, or different persons, at the times when the annual election to other offices was made. In 1757 Mr. Cole was elected registrar for the first time, and was annually re-elected till his death in *December*, 1804. A few years before Mr. *Cole's* death, the corporation, *at the request of the registrar to chuse a deputy registrar*, elected Mr. *Gotobed* deputy registrar, without a salary ; and he also has been annually re-elected since that time. 'The minute of his election stands entered in the books :—"The corporation then proceeded to the election of officers for the year ensuing;" and then follows the list of names of officers elected, amongst which is that of "*T. Gotobed*, deputy registrar." After Mr. *Cole's* death, in *December*, 1804, Mr. *Gotobed* continued *de facto* in the exercise of his office, in registering titles at the usual place, and in the same form and manner as he had done in Mr. *Cole's* lifetime. Of 130 titles registered by Mr. *Gotobed*, since his appointment as deputy, of which the registers were signed in his own name as deputy, and not in the name of the principal, 60 of them were registered after the death of Mr. *Cole*. The election of a new registrar in the room of Mr. *Cole*, came on upon the 17th *April*, 1805, when Mr. *Christian* and Mr. *Saffery* appeared as candidates ; and the former having 81 and the latter 82 votes, Mr. *Saffery* was declared duly elected, and was accordingly admitted and sworn into the office by the corporation. It was, however, objected on the part of Mr. *Christian* that some of Mr. *Saffery's* voters (said to be 13 in number) had their titles registered by the deputy registrar, after the death of his principal, four of whom had their titles so registered on the 13th of *April*, only four days before the election, when they had certain knowledge of the death of Mr. *Cole*. But the affidavits, on the other hand, stated that the first person to whom the objection, if any, applied, who proffered his vote at the election, tendered it for Mr. *Christian*, and was accepted by the corporation as a good vote, with full knowledge by all the parties

1805.

The KING
against
The
Corporation
of BEDFORD
Level.

[358]

1806.

The King
against
The
Corporation
of Bedford
Level.

parties present, of the circumstances under which the title was registered; and other objections which were now said to lie against several voters for Mr. *Christian* were reserved for future discussion.

Garrow, on the part of the corporation, stated their willingness to do whatever the Court should think proper to order, after hearing the counsel for the respective candidates.

[359]

The *Solicitor General*, *Wilson*, and *Abbot* shewed cause against the rule, and objected, 1st, That a *mandamus* ought not to issue where the right to an office may be tried in *quo warranto*; this writ being only granted where the party has no other legal remedy. (a) And they cited *Rex v. Nicholson and Other*, (b) where an information in nature of *quo warranto* went against persons who acted as trustees under a private Act of Parliament (without such an election as the statute required) for enlarging and regulating the port of *Whitehaven*; which was a trust of at least as private a nature as this where jurisdiction is given over an extensive tract of country, and it is declared to be a public trust by the Legislature. [Lord *Ellenborough*, C. J. There at least the information went against persons claiming to be commissioners having co-ordinate authority with those originally appointed by the whole Legislature for carrying the purposes of the Act into execution. But this is the case of one who is a mere servant, appointed by the body corporate created by the Act, and not one of the corporators themselves. *Lawrence*, J. It has always been considered that a *quo warranto* only lay for encroachments on franchises created by the crown.] There was another case of *Rex v. Badcock* and nine others, in *Hil. T. 1782*, where an information in *quo warranto*, was granted against the defendants, for exercising the office of commissioners for paving the town of *Taunton*, under an Act of the 9 Geo. 3. who had been improperly elected to fill up vacancies which had happened in the number of commissioners originally named in the Act. They were not a corporate body, and no franchise of the crown was invaded. [*Lawrence*, J. A power was therefore given to the commissioners under the Act to impose rates

[360]

(a) *Rex v. Bishop of Chester*, 1 Term Rep. 396.

(b) 1 Stra. 299.

and taxes on the inhabitants: which was a power even greater than the crown of itself could confer. But is there any precedent of such an information against a mere servant of a corporation, who is not himself a member of the corporation?]

The registrar is an officer, directed by the Act of Parliament, to be appointed, with certain public duties annexed to his office, and therefore comes within the rule laid down in that case, where the Court said that informations had been constantly granted, where any new jurisdiction or a public trust was exercised without authority. In *Rex v. Gouge* (a) it was granted against one for exercising the office of constable: and that was assented to by Lord Mansfield in *Rex v. Marsden*. (b) Here then Mr. Saffery having been admitted and sworn into the office, no other person is capable of being admitted till he is legally ousted by judgment of law: and the Court never grants a *mandamus* to admit to an office which is already full, unless in the case of a mere colourable election, which this cannot be pretended to be. *Rex v. The Mayor of Colchester*. (c) If the *mandamus* go, there will then be two principal registrars claiming adversely to each other. [Lawrence, J. There was a case, the name of which does not occur to me, where certain corporators had been removed improperly, as alleged, and other persons had been elected to fill their offices: and their informations in nature of *quo warranto* having been moved for against the persons elected, and *e contra*, *mandamuses* to restore those who were alleged to have been improperly removed, the Court ordered both to go together. (d) That shews that the persons in possession were first to be dispossessed before the others could be restored. Next, upon the merits of the election; 1st, The authority of the deputy registrar did not cease with the death of the principal registrar. Or, 2dly, If it did cease in law, yet it is sufficient for this purpose, that the deputy acted as officer *de facto*. 1st, Mr. Gotobed was not the deputy of Mr. Cole, but was an independent officer, receiving his appointment from the corporation itself, though styled Deputy; as in many

1805.

The King
against
The
Corporation
of Bedford
Level.

[361]

(a) 2 Stra. 1213.

(b) 3 Burr. 1821.

(c) 2 Term Rep. 259.

(d) Vide *Rex v. The Mayor, &c. of York*, where a *mandamus* was granted to the corporation to put their seal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was stated in answer, that another candidate had the majority of votes at the election, and that the corporation had already certified his election. 4 Term Rep. 699.

1805.
 —
 The KING
 against
 The
 Corporation
 of BEDFORD
 Level.

[362]

corporations power is given by charter to appoint a deputy-recorder, who is a substantive officer. The deputy's appointment has always been for a year certain, like the other officers; and though not named specifically in the Act of Parliament, yet the corporation have power to appoint any other officer besides those who are named. His authority therefore was co-ordinate with that of the principal registrar. His appointment was indeed *at the request of the registrar*, but it was made by the corporation. The same office may be granted to two; (a) and if these persons were in effect co-registrars, it cannot make any difference that it was by different appointments. (b) But, 2dly, Taking Mr. *Gotobed* to have been the deputy of Mr. *Cole*,—having been elected by the corporation by the desire and with the approbation of the principal, and consequently that upon the death of the principal the legal authority of the deputy, as such, ceased, yet that will not affect the titles of the voters; as to whom it is sufficient by the Act of Parliament that their titles have been in fact registered. They cannot scrutinize the regularity of the officer's appointment, who is constituted by the corporation for the purpose of making registry. It cannot be required of a purchaser or a lessee to do more than carry his title-deeds to the common office, and have them registered by the person who is in fact executing the office of registrar, by the permission of the corporation, whether for himself or another:—he is a mere ministerial officer, having no discretion to exercise. This is most like the case of a steward of a manor, who may take surrenders, and do other ministerial acts, though not legally invested with the office; because, as it is said in *Knowles v. Luce*, (c) those for whom such acts are done, know not the extent of his title. And there *Mamwood C. B.*, who delivered the judgment of the Court, compares it to the case of an under-steward, when the head-steward is dead, whom he considers to have a colour of authority; so that if he assemble the tenants, and they do their services at the Court, the acts which he does there are good. And he distinguishes that from the case of an

(a) 4 Com. Dig. 240. tit. Officer, B. 4. *Yonge v. Stowell*, W. Jones, 310, Cro. Car. 555; and *Jones v. Beau*, 4 Mod. 17.

(b) Auditor *Curle's Case*, 11 Rep. 4.

(c) *Moor*, 112. This was confirmed in *Parker v. Kett*, 1 Ld. Ray, 661. and vide 1 Watkins on Copyh. 257, which was referred to.

officer

officer who acts without either colour or right. Besides, it would be attended with great public mischief if the titles to land throughout a large extent of country, into which the objection is now resolved, were to depend upon the regularity of the registrar's appointment. Such an objection, therefore, is not to be preferred, even if it be competent to one of the candidates to raise it in a collateral proceeding, where the owners have no opportunity of defending their titles.

1805.

The KING
against
The
Corporation
of BEDFORD
Level.

Erskine, Lambe, Warren, and Littledale, in support of the rule. 1st, Even if an information in nature of *quo warranto* lay for such an office, it would be no objection to a concurrent *mandamus*; for if Mr. *Saffery* were shewn not to be duly elected, it would follow that Mr. *Christian* ought to be admitted and sworn, and the *mandamus* would go of course for that purpose. But there is no authority for saying that such an information will lie in a case where no franchise of the crown is usurped; and the opinion of Lord *Kenyon* in *Rex v. Shepherd*, (a) is to the contrary: on which ground the Court there refused to grant such an information to try the validity of an election to the office of churchwarden. In *Rex v. Nicholson*, (b) and *Rex v. Badcock and Others* (c) the powers granted to the commissioners were even of a higher nature than the crown could alone confer; it was necessary therefore for the other branches of the Legislature to join with the crown in creating the trusts. But the registrar is no part of the corporation, that might have assimilated this to the case cited: but he is an officer appointed by them, together with many others; and if an information in nature of *quo warranto* lay for this office, it would also lie against every menial servant appointed by them, and against many hundred sluice-keepers. Nor is this to be considered as an appointment for a year certain; for though the governor, bailiffs, and conservators are to be elected annually, yet the officers appointed by them are removable at pleasure; and therefore the appointment may be determined at any time; which alone is a reason why such an information would not lie for the place of registrar. [Lord *Ellenborough*, C. J. Must it not be considered as an office for a year, according to the terms of the appointment, unless the corporation should

[363]

[364]

(a) 4 Term Rep. 381.

(b) 1 Stra. 229.

(c) Ante 359.

1805.
 The KING
 against
 The
 Corporation
 of BEDFORD
 Level.

[365]

determine their pleasure within that time? Would not that be the legal effect of the appointment controlled by the Act of Parliament?] Then, with respect to the rights of the voters, the exercise of the right necessarily puts the validity of the title to vote in issue; and it cannot make any difference to them, whether their right be questioned by way of *mandamus* or information in nature of *quo warranto*; and the elections being annual, is a reason for preferring the more speedy remedy. 2dly, Whether or not the corporation could grant the office of registrar to two as co-registrars, without a custom to warrant it? and that too, by a subsequent appointment of the second after the office was full of the first, without vacating the former appointment, which is much to be questioned; yet here the appointment of Mr. *Gotobed* was specifically as *deputy*, which is not warranted by the Act; for that only enables the corporation to appoint a registrar; that is, one officer; and though they may appoint "other officers," that must mean persons exercising other offices than those before named; whereas a deputy *ex vi termini* must execute the same office as his principal. Though even considering this as an appointment of two to the same office, upon the death of one it would determine and not go to the survivor, according to *Jones v. Pugh*. (a) It may even be doubted how far the registrar, though a ministerial officer, yet having a trust annexed to his office requiring skill and integrity, could appoint a deputy without express words in the Act of Parliament, which cannot be aided by custom where there is an ambiguity; (b) and the more so in this case, as by the 14th-sect. an oath of office is to be taken by the registrar himself, but none by his *deputy*, unless he come within the description of *other officer* to be appointed by the corporation. But, 3dly, at all events the office of deputy must necessarily cease at the death of the principal; and till the present, there is no instance of a deputy registering deeds after the death of his principal. The stat. 3 Geo. 1. c. 15. s. 8. confirms the general principle, by providing for the continuance in office of the under-sheriff or deputy-sheriff, on the

(a) Salk. 465.

(b) 5 Com. Dig. 244, tit. Officer, D. 2, Earl of Shrewsbury's case, 9 Rep. 48, and Nevil's case, 11 Howd. 378.

death of his principal, till another be appointed. (a) And provisions are made by the *Yorkshire Register Acts*, (b) for providing a person to execute the office of registrar on the death of the principal, upon the presumption that the office of his deputy, which is also recognized by those Acts, would then cease. With respect to the case of the under-steward of a manor, mentioned in *Moor*, whose acts may be good after the death of his principal, supposing it to be good law, it is so far distinguishable from the present, that the acts of the person acting *de facto* with any colour of authority in the name of the lord, shall so far bind him, that the tenants, who have no voice in his appointment, and no means of ascertaining the regularity of his appointment, shall not be prejudiced by it; whereas here the persons whose titles are in question are themselves the corporators who make the appointment, and who consequently have power to examine the title of the person appointed, or of him who in fact assumes power to register the title-deeds. [*Laurence, J.* A new purchaser is no corporator till his title be registered; therefore, till then he has no more authority to examine the title of the registrar than a copyholder has to examine that of the steward of the manor.] Here the title depends upon the Acts of Parliament, of which all are bound to take cognizance. There too, the under-steward represents the lord, who may do the act himself; but here the corporation themselves could not register the titles, which must be done by a legal registrar under the Act of Parliament. At any rate, the appointment of the deputy in that case being originally good, the tenants might not have knowledge of the death of the principal; but here it expressly appears, that some at least of those whose titles were registered by Mr. *Gotobed* recently before the election, had notice of *Cole's* death at the time.

Lord ELLENBOROUGH, C. J. The only point which presses at all upon our minds is, Whether Mr. *Gotobed* were not a sufficient ministerial officer *de facto*, so as to make his registering the title deeds of the voters after the death of Mr. *Cole* a legal registration? With respect to the question made against the issuing of the *mandamus*, because an in-

1805.

The KING
against
The
Corporation
of BEDFORD
Level.

[366]

(a) The Act goes further, and is compulsory on the under-sheriff to execute the office during the interval.

(b) 2 & 3 Ann, c. 4. 6 Ann, c. 35, and 8 Geo. 2. c. 6.

1805.
 ———
 The KING
 against
 The
 Corporation
 of BEDFORD
 Level.

[367]

formation in nature of *quo warranto* would lie in this case, I know of no instance of such an information granted for the office of a mere servant to a corporation; and the instances supposed to apply have already received an answer. Neither is there any pretence for considering Mr. *Gotobed* as co-registrar. He is indeed elected by the corporation; but the Board proceeded to the election of him as deputy registrar, stating it to be at the request of the registrar to chuse a deputy registrar; that was the substantive object of their election; and the appointment being made, with the acquiescence of the principal standing by, and indeed at his request, must, if necessary, be considered as his appointment. If then he were to be considered as the deputy of *Cole*, his authority would necessarily expire on the death of his principal. I feel myself pressed, however, with the authority of the doctrine in the case in *Moor*, that the acts of an under-steward may be good after the death of his principal; and it is a very important point to be considered how far that may be carried.

LAWRENCE, J. (a) The last is the only point deserving of further consideration. As to the granting of an information in nature of *quo warranto*, I cannot conceive that it can be done against a mere servant of a corporation, one who exercises no franchise or authority of any kind under the crown. Besides, I do not know that it is an universal rule, that where such an information lies, the Court will in no case grant a *mandamus*. There may, I conceive, be occasions where the latter might be deemed the more proper remedy. A principal object in granting an information in nature of *quo warranto*, where facts are in dispute, is to ascertain the facts; but here no fact is disputed, but a mere question of law. The appointment itself of Mr. *Gotobed* as deputy registrar is not professed to be made by Mr. *Cole*, but by the corporation; and it is difficult to say how they could have power to appoint a deputy to the registrar. But if it be considered as any appointment at all of a deputy, he must be considered as the deputy of *Cole*, and that *Cole* appointed him, though nominally the appointment was made by the corporation, *Cole* consenting. Therefore, on

(a) Mr. Justice Grose was absent at this time.

the death of the principal, the authority of the deputy was at an end. The other question, however, is very important to be considered, the consequence of it being very extensive.

* **LE BLANC, J.** It is very difficult to sustain the argument which has been urged, that this is an office for which an information in nature of *quo warranto* will lie. But it is material to consider whether this were an appointment of a deputy registrar by the principal, or by the corporation. If the principal apply to the corporation to appoint his deputy, it may be considered as his appointment. But if the question be, Whether either the corporation or the principal had authority to appoint a deputy? or, Whether, upon the death of the principal, the deputy's authority did not instantly cease? the consequences may be very important, as affecting the titles of so many persons; and therefore the question is fit to be duly considered.

LORD ELLENBOROUGH, C. J. on the next day delivered the opinion of the Court. The only point made in this case on which the Court entertained any doubt, was, Whether Mr. *Gotobed*, in acting as a registrar after the death of Mr. *Cole*, was to be considered as an officer *de facto*, whose acts would give effect to the conveyances registered by him during that period?—and we think he cannot be so considered. On these affidavits he must be taken as a deputy and assistant to Mr. *Cole*; and as the necessary consequence of the death of the principal was putting an end to his authority as deputy, the question is, Whether, according to the cases respecting the stewards of manors, he had such colourable authority, into which the purchasers of lands could not examine, as to induce them to register their deeds with him from their having a fair ground to infer that a registration by him would be good and sufficient to effectuate their conveyances?—An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. **1 Ld. Ray. 660.** In this case, *Gotobed* was never more than deputy; and therefore after the death of his principal he never could have had the reputation of being more than deputy; but such reputation must necessarily have ceased with the knowledge of the death of his principal. When that fact was notorious to the owners of land in this Level, no one could

1805

The KING
against
The
Corporation
of BEDFORD
Level.

* [368]

[369]

1803.
 The KING
 against
 The
 Corporation
 of BEDFORD
 Level.

could have registered his deeds with him under a belief that he was acting as the assistant of one, who by the course of nature had ceased to fill the office, in the execution of which he was to be assisted by the deputy. In this case *Cole* died in *December*; and the greater part of the conveyances objected to, were registered some months after on the election. The case pressed upon us from *Moor* 112, on being considered, is not, we think, an authority against this opinion; where *Manwood*, C. B. says that "There is a diversity between copyhold grants by a steward who has a colour, and no right to hold a court, and one who has neither colour nor right; for if one who has colour assemble the tenants, and they do their service, the acts are good which he does as the under-steward, when the head-steward is dead." But this must be understood of acts of the under-steward after the death of his principal, and before his death is known; for if that were known to the tenants, what colour could he have to act? It is said in that book, that the acts of such steward (i. e. a steward *de facto*) are good; because the suitors cannot examine his title; but when his authority has notoriously ceased, no such reason obtains. This doctrine of *Manwood's* seems no more than what was the law in the case of all judicial offices, when the interest of the officers determined on the demise of the crown: for though, in consideration of law, the commissions of the Judges, &c. immediately determined on such demise, yet their intermediate acts, between the demise of the crown and notice of it, were good. 2 *Hale's P. S.* 24, *Cro. Car.* 97, *Sir Randolph Crew's Case*. We wish to be understood as saying nothing as to the registration of conveyances by Mr. *Gotobed* in Mr. *Cole's* life; and as it does not appear that any registrations have been made by a deputy after the death of a principal before the present occasion, we do not apprehend that any ill consequences will result from this our opinion, which is confined to such registrations.

[370]

The Court then observed, That as it had been stated that there were some votes objected to on the part of Mr. *Saffery*, it was necessary to examine into the validity of those objections before they finally pronounced upon the rule for the *mandamus*, as the parties could not agree to try the whole case upon feigned issues; but those who opposed the rule

rule for the *mandamus* having declared that they should reserve their objections to a future stage of this proceeding, the Court made this

Rule absolute.

1805.

The KING
against
The
Corporation
of BEDFORD
LEVEL.

SIFFKEN and FEIZE, Assignees of BROWN, a Bankrupt,
against WRAY.

[371]

Friday,
May 17th.

IN *trover*, for a quantity of wheat, which was tried on the general issue before Lord *Ellenborough*, C. J. at the sittings after *Trinity Term*, 1804, a verdict was found for the Plaintiffs for 84*l.* 3*s.* 7*d.* subject to the opinion of the Court, on the following case:—

Browne, the bankrupt, committed an act of bankruptcy on the 2d of *September*, 1801, upon which a commission, dated the 5th of *October* following, was issued, and he was afterwards duly declared a bankrupt, and the plaintiffs were chosen his assignees, and his effects assigned to them. The bankrupt for some time antecedent to *September*, 1801, was a merchant in *London*, importing corn and other merchandise from *Dantzic* and other places on the continent. *Fritzing* of *Hamburg* was the bankrupt's agent there, upon whom the bankrupt occasionally assigned a credit with *Dubois* and Company of *Dantzic*, for merchandise purchased by them for him on the continent; allowing *Fritzing* the usual mercantile commission upon such transactions as passed through his hands. Messrs. *R.* and * *J. Wilson* of *London* were the corn-factors of the bankrupt; and he, on ordering purchases of corn, frequently assigned a credit on them. In *July*, 1801,

B. a trader in London, ordered goods to be shipped to him by D. and Co. his correspondents at Dantzic, who were to draw for the amount on F. at Hamburg, (who had agreed to accept the bills upon receiving commission on the amount) and the bills of lading & invoices were to be transmitted by D. & Co. from Dantzic to F. at Hamburg, who was to forward them to B. in London; & F. accordingly accepted the bills of exchange drawn upon him, and on the receipt

of the bills of lading transmitted the same (which were made out to the order of the shippers and not indorsed) to B. in London, who received them, together with the invoices and letter of advice, five days after an act of bankruptcy committed by him. F. also became a bankrupt, and the bills of exchange drawn on him by D. and Co. were obliged to be taken up and paid by themselves: held, 1st, That F. had no right to stop the goods *in transitu*, being no more than a surety for the price, and not vendor or consignor. 2dly, That one who was general agent of F. in London having obtained the bills of lading from the bankrupt after his bankruptcy, upon an agreement when the goods arrived to dispose of them, and to apply the net proceeds to the discharge of such bills as had been drawn against the goods, had no authority to retain the proceeds against the assignees of B. the bankrupt, either in respect of F. or in respect of a stopping *in transitu* on behalf of D. and Co. the shippers, who after his possession of them, and after *trover* commenced by B.'s assignees for the value, sent a letter to him approving of his having obtained a possession of the bills of lading and the goods; for at any rate there was no adverse stopping *in transitu*, but the goods were obtained by agreement with the vendee after his bankruptcy, even if the defendant could be considered as agent at the time for the shippers by relation.

1805. the bankrupt gave an order to *Dubois* and Company to ship for him 200 lasts of wheat in addition to 200 lasts then already ordered and shipped, and to value for the same in the usual way; viz. one-third on the bankrupt, one-third on *Fritzing*, and one-third on *Wilson*; or, if more convenient, to *Dubois* and Company, one-half on the bankrupt, and one-half on *Fritzing*; and to forward the shipping documents to the bankrupt through *Fritzing*. In pursuance of this order, *Dubois* and Company procured 102 lasts of wheat and no more, on the account and risk of the bankrupt; and shortly afterwards shipped at *Dantzic* 74 lasts thereof by the *Aurora*, 18 lasts by the *Die Froke Gesellschaft*, and 10 lasts by the *Duchess*, in part of the 200 lasts so ordered as fresh purchases; and on the 18th of *August*, 1801, they wrote a letter to the bankrupt, advising him of their having so done, and having in consequence drawn the after-mentioned bills on *Fritzing* and Messrs. *Wilsons* respectively, and having forwarded the ship documents of the two last-mentioned shipments to *Fritzing* to the further disposition of the bankrupt. On account of these fresh purchases, *Dubois* and Company on the 14th of *August*, 1801, drew bills of exchange on the bankrupt to the amount of 1000*l.* which he accepted, but did not pay. On the 18th of *August* they drew a bill on *R.* and *J. Wilson* for 500*l.* which was not accepted; and on the same day they drew bills on *Fritzing* for 1136*l.* 4*s.* 5*d.* which were accepted. The invoice price of the wheat by the two ships *Froke Gesellschaft* and *Duchess* was about 1400*l.* The parcel of wheat by the *Aurora* was stopped *in transitu* by *Dubois* and Company. On the same 18th of *August*, 1801, *Dubois* and
- [373] Company transmitted to *Fritzing* the last-mentioned letter of that date written to the bankrupt, and two bills of lading indorsed in blank of the two parcels of wheat by the *Gesellschaft* and *Duchess*, in a *German* letter, of which the following is a translation: “ *Mr. J. D. Fritzing* at *Hambro*’, *Dantzic*, 18th *August*, 1801. Sir, In answer to your two favours of the 21st and 28th ult. which we duly received, we pass the tenor thereof in silence, as we agree. We have laden for account for our mutual friend *Mr. R. Brown*, of *London*, 18 lasts of wheat in 367 sacks and seven deckers of mats on board the *Koningsberg* ship called the *Froke Gesellschaft*, *M. Ridder*, master, 10 lasts ditto in 200 sacks, and three

—
 SIFFKEN
 and Another
 against
 WRAY.

three deckers of mats on board the ship *Duchess of Barkley*, *J. Barr*, master; and whereof you will find invoices and bills of lading here enclosed at your service; against which, however, we request you will be pleased promptly, upon presentation, to honour our drafts of this day, &c. (the drafts which were set out in the letter were seven in number, and drawn in favour of different persons, in the whole to the amount in sterling money of 1136*l.* 4*s.* 5*d.*) and to account respecting the same with our said friend in *London*." Signed *Dubois and Company*. The bills of lading are in the usual form, both describing that *Dubois and Company* were the shippers, and that the wheat by the *Gesellschaft* was to be delivered to *Messrs. J. H. Dubois and Company, or order*; and the wheat by the *Duchess* unto *order or assigns*. *Fritzing* wrote a letter on the 25th of *August*, 1801, to *Browne* the bankrupt; of which the following is an extract:—"Inclosed I transmit you a letter from *Messrs. Dubois and Company* who inform me that the bills of lading of 18 lasts of wheat in 367 bags D. and seven bundles of mats, by the *Froke Gesellschaft*, Captain *Ridder*, and of the parcel of wheat by the *Duchess*, Captain *Barr*, from *Barkley*, shall be forwarded next post, as the Captain had not sent them before departure of the mail. I now debit your account for 1136*l.* 4*s.* 5*d.* in *Dubois and Company's* drafts, 18th *August*, ten weeks date, which are under acceptance, and of which please make due notice." *Fritzing*, in a letter of the 28th of *August* 1801, transmitted to the bankrupt the two bills of lading without indorsing them, and also the letter from *Dubois and Company* to the bankrupt, of the 18th of *August*, 1801, and which corresponded with the statement in *Fritzing's* letter to *Browne* of the 25th of that month. The bankrupt received *Fritzing's* letter, the bills of lading, and *Dubois's* letter on the 7th of *September*, 1801, being five days after an act of bankruptcy committed by him. The *Froke Gesellschaft* arrived in the port of *London* on the 28th of *September*, 1801; and the *Duchess* on the 2d of *October* following. The bills so drawn by *Dubois and Company* on the bankrupt for 1000*l.* sterling, on *J. and R. Wilson* for 500*l.* and on *Fritzing* for 1136*l.* 4*s.* 5*d.* were dishonoured and returned: and *Dubois and Company* have retired or taken up the whole of them. The defendant was the general agent in this kingdom of *Fritzing*;

1805:
 SIFFKEN
 and Another
 against
 WRAY.

[374]

and

1805.
 —
 SIFFKEN
 and Another
 against
 WRAY.

[375]

and the bankrupt, on the 7th September, 1801, delivered to the defendant the bills of lading of the two parcels of wheat by the *Froke Gesellschaft* and *Duchess*, on his giving an undertaking in writing, of which the following is a copy:—Mr. *Robert Browne*, London, 6th September, 1801. “Dear Sir, I hereby acknowledge to have received from you two bills of lading; viz. 10 lasts of wheat in 200 bags by the ship *Duchess*, Captain *Barr*; 18 lasts of wheat in 367 bags by the *Die Froke Gesellschaft*, Captain *Ridder*, shipped by *Dubois* and Company in *Dantzic*, which I will receive on arrival and dispose of to the best advantage; the net proceeds of which two parcels of wheat shall be exclusively applied to the discharge of such bills as have been drawn against them. I am, dear Sir, &c. *A. Wray*.” —The defendant obtained the possession of the wheat and sold the same, the net proceeds whereof amounted to 843*l.* 3*s.* 7*d.* which the defendant has paid into the bank in the name of the Accountant General, in a cause in Chancery, to which the plaintiffs and defendants in this cause, and *Dubois*, with the curators of *Fritzing*’s estate, are respectively parties, to abide the verdict in this cause, and the Lord Chancellor’s decree thereon. This action was commenced on the 6th of *February*, 1802. On the 19th of *March*, 1802, *Dubois* and Company did by letter approve of the defendant’s having obtained the possession of the two bills of lading by the *Duchess* and *Gesellschaft*, and also of the wheat which is the subject of this action, and claimed the proceeds arising from the sale of the wheat. *Fritzing* has become a bankrupt, according to the laws and regulations of *Hamburgh*; and *Pitcarn* and *Ludendorf* of *Hamburgh*, merchants, have been appointed his assignees or curators and as such, claim the proceeds of the said two parcels of wheat. The bankrupt at and from the time of shipping the two parcels of wheat, was and now is indebted both to *Dubois* and Company and to *Fritzing* in a greater sum of money than the invoice price of the wheat. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court should be of opinion that they were entitled to recover, the verdict to stand; if not, then a verdict to be entered for the defendant.

[376]

Scarlett, for the plaintiffs, said, There was no case directly in point; but the principles of the decided cases governed this. To prevent the recovery of the plaintiffs, it must either be shewn that

that they can derive no authority from *Browne* the bankrupt, on account of some act done by him to divest himself of his right to the goods in question (the 10 and the 18 lasts of wheat last mentioned in the case) before his bankruptcy, or that the goods were stopped *in transitu* by the vendor, or some person standing in the same relation to them. 1st, This case cannot range itself under *Atkin v. Barwick*, (a) explained as it is by subsequent cases; (b) for supposing the goods there to have been accepted at all, at any rate they were returned before the bankruptcy of the vendee. But no case has gone the length of deciding that a trader who has actually committed an act of bankruptcy can make such return: and here the supposed dereliction of the goods by *Browne* was five days after his act of bankruptcy, when he was no longer in a condition to do any act in prejudice of his estate, nor had any authority to rescind the contract. The bills of lading at the time of their arrival, were by relation back the property of his assignees; and no other than they or some person having a right to stop the goods *in transitu* could alter the property. 2dly, It must be contended, That *Fritzing* of *Hamburg* stood in the relation of vendor of the goods, and as such had a right to stop them *in transitu*, and had exercised that right in time by means of the defendant his agent in *London*. But *Fritzing* stood in no such relation, and had no such right. He was the agent at *Hamburg* of the bankrupt vendee, merely for the purpose of accepting bills, but not for the purchase or shipment of the goods; which differs this case materially from that of *Feise and Another*, assignees of *Browne* against *Wray*, (c) arising out of the same bankruptcy; for there *Fritzing* was the shipper of the goods to the bankrupt, and they were procured by him upon his own credit; and therefore it was holden that he stood in the relation of vendor to the bankrupt, and might stop the goods *in transitu*. But here *Dubois* and Company were the vendors and shippers of the goods; for the price of which *Fritzing* was not in the first instance answerable. The bills of lading were indeed transmitted through *Fritzing* by the orders of the bankrupt, in order to shew him that there was value sent by *Dubois* and

1805.

SIFFKEN
and Another
against
WRAY.

[377]

(a) 1 Stra. 165. Fortes, 355. 10 Mod. 431; and 11 Mod. 295.

(b) *Vide* Neate v. Ball, 2 East, 122, 220, &c. where all the explanatory cases are collected.

(c) 3 East, 93.

1805.

SIFFKEN
and Another
against
WRAY.

[378]

Company to the bankrupt for the bills of exchange, which were drawn upon *Fritzing*; but the latter was to forward the bills of lading on to the bankrupt. Then *Fritzing's* acceptance of the bills of exchange drawn upon him by *Dubois* and Company by the order of the bankrupt, could not give the former any interest in the goods in respect of which such bills were drawn; for that was a mere money transaction between the bankrupt and *Fritzing*, which, if the acceptances had been paid, would have constituted the relation of debtor and creditor between them, but not that of vendor and vendee, or consignor and consignee. Neither could *Fritzing* have any lien on the goods; for they were never in his possession. And even if the possession of the bills of lading could have given him a symbolical lien on the goods while he held those bills, yet he parted with that lien when he transmitted the bills of lading to the bankrupt. Then with respect to *Dubois* and Company their ratification of the defendant's act of taking possession of and converting the goods, cannot make it a stopping *in transitu* by relation back on their account. The defendant was no agent of their's at the time, but was either the agent of *Fritzing* or a mere volunteer taking the goods for whoever should prove to be legally entitled to them at the time: he was, therefore, as much the agent of the bankrupt or of his assignees as any other. Besides, there is no instance of a stopping *in transitu* after an actual conversion of the goods, and they have ceased to exist in specie; and before the defendant became the agent of *Dubois* and Company he had actually converted the goods; but at any rate the defendant derived his title to the goods, whatever it might be, from the bankrupt himself, by means of his delivery of the bills of lading to him; and consequently the defendant's possession under that title must operate in favour of the assignees, who had the property of those bills in them at the time; and the assignees asserted their title before any interference by the vendors.

Marryat contra. The demand of the plaintiffs is against conscience, after the bankrupt's estate has been disencumbered of the payment of the bills of exchange drawn upon him and his agents in respect of these goods, the vendors themselves having taken them up. 1st, Though there be no case in point, yet the principle on which the stoppage of goods

goods *in transitu* has been allowed to a mere consignor of goods, on account of his liability to the original owner for the price, applies equally in favour of one who has become surety for the price, in order to facilitate the sale. The right itself is founded in equity, to prevent the manifest injustice of a vendee taking the goods without paying for them. The principle is sustained very generally by the civil law; and though the first recognition of it here was by a court of equity in 1690, (a) yet it was soon after adopted by the courts of law. [Lord *Ellenborough*, C. J. If we are to proceed on equitable principles, you should show us some case in equity where a surety for the price of goods has been considered as entitled to stop *in transitu*; otherwise we shall be running before the courts of equity instead of following them in this matter as we have hitherto done.] Then, 2dly, Supposing the right of stopping *in transitu* to be confined to a consignor of the goods, *Fritzing* is to be considered as such. He was to pay for the goods by his acceptances, and the bankrupt was to allow him a commission for his risk and trouble, over and above the price of the goods; which must be considered as an advance of so much upon the price of the goods in his hands, and puts him in the common situation of a consignor of goods abroad, who is employed by the vendee here to purchase goods for him upon his credit. [*Le Blanc*, J. This was not the *shipping* commission, but merely a commission for giving the bankrupt a credit, to order bills to be drawn upon him.] It was part of the shipping order from the bankrupt to send the shipping documents to *Fritzing*; and in consequence the invoice, letter of advice, and bills of lading were all sent by *Dubois* and Company to *Fritzing*; he therefore is in fact the consignor to *Browne*. But admitting that *Dubois* and Company were consignors, there is no reason why *Fritzing* may not also be a consignor in a case where the consignee puts himself in a situation to require credit of two different persons. In that case, the goods having been stopped by the defendant, the general agent of *Fritzing*, before they came to the hands of the bankrupt or his assignees, his possession is lawful. But, 3dly, At any rate the adoption of the defendant's

1805.

—
 SIFFKEN
 and Another
 against
 WRAY.

[379]

[380]

(a) *Wiseman v. Vandeput*, 2 Vern. 203.

1805.
 SIFFKEN
 and Another
 against
 WRAY.

act by *Dubois* and Company the shippers, will validate the stoppage which he has made. It is a perversion of the fact to consider the defendant as the agent of the bankrupt or his assignees; the circumstances of the case shew that he received the bills of lading in exclusion of any such authority. He received them upon an undertaking to apply the proceeds of the goods in discharge of the bills drawn against them; and by making himself responsible for those bills, he ultimately made himself the agent at the time for *Dubois* and Company who had taken them up, and who are in truth the real defendants in the cause. If the bills of lading had not been delivered up by the bankrupt upon demand, adverse measures would have been taken; but the yielding of the bankrupt cannot alter the character of the agent.

Lord ELLENBOROUGH, C. J. This has not the aspect of a stopping *in transitu*, which should be stated to be done *eo intuitu*; and it should be done adversely to the vendee; but nothing of that sort appears in the case before us: it is not an adverse proceeding, but under an agreement with the bankrupt, in consequence of which he delivered up the bills of lading to the defendant, whom we must understand as taking possession through the means stated to us. The agreement in writing given at the time, must best explain with what view the delivery of the bills of lading was made. The defendant had no authority from *Fritzing*, for *Fritzing* himself [381] had no right to stop the goods *in transitu*. *Fritzing's* situation in this transaction was very different from what it was in *Feise v. Wray*. There he was liable in the first instance for the price of the goods; and, therefore, the Court considered him as a vendor *quoad* the bankrupt here to whom he had shipped them. Then, with respect to *Dubois* and Company the defendant was no agent of theirs, nor received any authority from them till after this transaction. But supposing him to have been their agent before, there was no adverse taking possession of the goods, but they were taken back upon an amicable agreement with the bankrupt after his bankruptcy. Therefore, upon the whole, the defendant was neither agent for *Dubois* and Company, nor was there any adverse stopping *in transitu* by him.

Marryat then said, That as there was an adverse stopping *in transitu* intended, the parties must apply to the Lord Chancellor

Chancellor to have the case restated: though he admitted that the obtaining of possession by the defendant was facilitated by the delivery up of the bills of lading without resistance.

LORD ELLENBOROUGH, C. J. If the defendant were adversely in the first instance to get the bills of lading, he afterwards abandoned that purpose.

LAWRENCE, J. If he went adversely, as you state it, he nevertheless got the goods by agreement with the bankrupt.

Per Curiam,

Postea to the plaintiffs.

1805.

SIFFKEN
and Another
against
WEAY.

[382]

LE MESURIER and Another against VAUGHAN.

Friday,
May 17th.

THIS was an action upon a policy of insurance, dated the 2d of March, 1801, at and from New York to Gibraltar on goods “on board of the good ship called the ‘The American ship *President*,’ (a) whereof was master for that voyage, or whosoever else should go for master in the said ship, or by whatever other name or names the same ship, or the master was or should be named or called.” The declaration, after stating the policy, averred that the Defendant became an assurer of 300*l.* on goods on board of the ship mentioned in the policy. That a large quantity of goods was loaded and put on board of the said ship at New York, to be carried from thence upon the said voyage; and that, in the course of the voyage, the ship and goods were lost by capture. The defendant paid the premium into court upon the money count, and pleaded the general issue; and at the trial before Lord Ellenborough, C. J. at the Sittings at Guildhall, after last Michaelmas term, a verdict was found for the Plaintiffs for 287*l.* 10*s.* subject to the opinion of the Court, upon the following case:

The plaintiffs effected the policy in question upon flour, on account of the commissioners for victualling his Majesty’s navy; and the plaintiffs’ clerk was directed to make the insurance on the ship *President*, and to designate her as *American*. The invoice, dated New York, 14th Feb. 1801, according to which the insurance was directed to be made, proved.

(a) This case came on once before in another shape, when the Court thought that this was a description of the name of the ship, and not a warranty of her being American.

described

1805. described the goods to be "loaded on board the American ship called the *President*, of New Bedford, * A. P. master," &c. In consequence of these directions he effected the policy in question. The goods insured were shipped on board the ship called the *President*, mentioned in the invoice, and which was an American ship; and she sailed with the goods which were the subject of the insurance on board, upon the voyage described in the policy, and was captured with the goods on board in the course of her voage, and before her arrival at *Gibraltar*. It was insisted on the part of the defendant, that this evidence did not support the declaration, and therefore the plaintiffs ought to be nonsuited; and the question reserved was, Whether the plaintiffs ought to be nonsuited, or the verdict to stand?

LE MESURIER
against
VAUGHAN.

[383]

Giles for the plaintiffs contended, that the evidence supported every allegation in the declaration. The name of the ship was indeed miscalled in the policy, "*The American ship President*," the real name being "*The President*," and being only meant to be designated as an *American*; but the policy also describes the same ship "by whatever other name called;" and the identity of the ship in which the goods were lost, with that in which they were insured for the voyage, is proved by the facts found in the case, which puts an end to the question. Then the averment that the goods were put on board the said ship, necessarily refers to the whole description. If this were the ship on board of which the goods were intended to be insured, the name of it is immaterial; though the insurance could not have been applied to a different ship than that which was intended.

Warren, *contra*, contended that the mistake in the name was not cured by the words "or by whatever other name called." It may be true, that this was the same ship intended to be insured by the assured; but such intention to insure on the ship *The President*, an *American*, was never communicated to the underwriters; and at any rate, whether the misnomer happened from mistake or intentionally, it operates as a fraud upon them to substitute a mere name in the place of a warranty, the benefit of which, though certainly so understood by the parties at the time, has thus been lost to the underwriters. If the general clause would cover all errors in the name of the ship, it is nugatory to give

[384]

give it any name, and policies may as well be on "ship or ships;" for which hitherto a higher premium has always been demanded, while the assured has always had the benefit of lessening the premium by giving the ship a particular name. [Lord *Ellenborough*, C. J. If there were any deceit upon or prejudice to the underwriter from having a false name given to him, there can be no doubt but that he would not be bound.] It is sometimes difficult to prove a fraudulent intention. But there are many errors in description which can neither be said to deceive or increase the risk of the underwriter, which yet have been holden to avoid the policy. And if the intent be to insure a particular ship with a known name, the underwriter ought to be able to know that with certainty. If the name of another known ship had been inserted by mistake of the plaintiff's clerk, it must be admitted that this policy could not have been applied to this ship; and *non constat* but that there was another ship called "*The American ship President*." Though it cannot in reason differ the case if the name of a non-existing ship has been inserted; for *non constat* that the underwriters knew that the ship *The President* was the subject of insurance; and the error here is the more important, since it has deprived him of the benefit of the warranty intended to be made.

1805.

LE MESURIER
against
VAUGHAN.

[385]

LORD ELLENBOROUGH, C. J. Certainly, a true description both of the name of the ship and of the voyage intended, should be observed to the extent which the terms of the policy itself require. But the framers of this policy, contemplating that there might be a mistake in the name given to the ship, have added these words, "or by whatever other name or names the same ship should be called:" they have therefore provided for the event which has occurred, of a mistake in the name. It is said, however, that giving effect to those words will introduce fraud, and will prejudice the underwriters; but whenever such a case occurs we shall deal with it accordingly. The present is the case of a plain mistake of the broker who effected the policy, who received intelligible instruction to insure goods on board an *American* ship called *The President*; but has stated it all as one name of a ship called "*The American ship President*," instead of stating it as part name and part description. Then it is ob-

1805. jected that the underwriter has by this mistake been deprived of the benefit of a warranty that the ship was American: that is true; but is he not to look at the instrument he subscribes; and if there were no warranty, he would have a higher premium. I did not know that there had been authority upon the subject; but my brother *Lawrence* has found one, which is a decision by Lord C. J. *Lee* on this very point.

LE MESURIER
against
VAUGHAN.

[386]

LAWRENCE, J. read the note of the case alluded to:—
[“ *Hall v. Molineux*, 17th December, 1744, at *Guildhall*, cor. *Lee*, C. J. An insurance was made upon a ship called ‘The *Leopard*, or by whatsoever other name or names the same ship should be called,’ whereof was master for that voyage *A. B.* or whosoever else should be master. Upon the evidence of *A. B.* it appeared that the ship of which he was master, was called *The Leonard*, and was never called by the name of *The Leopard*. And it was insisted by the defendant’s counsel, that this was not the ship insured, it being of another name: and that the words, “by whatsoever other name or names the same ship should be called” would not help it; because those words meant where a ship was called by the name in the policy, and likewise by some other name; and not, as here, where it was never called by the name in the policy. For the plaintiff it was urged, that the words are, ‘by whatsoever other name the same ship shall be called;’ and therefore it was only necessary to prove the identity, which was done here by Captain *A. B.*, who said that he was master of *The Leonard*: and that the name was no more than one description of the ship. And of this opinion was the Chief Justice.”]

Even without this authority, I do not see the mischief which it is supposed may arise to the underwriter in this case. If there had been another ship with the same name as that mentioned in the policy, on board of which the plaintiffs had had goods, there might arise that inconvenience. But if the underwriter cannot be prejudiced by the mistake, the same reason does not apply. And the very circumstance of introducing such words as those relied on into the policy, shews the indifference of the underwriter as to the name of the ship. Then, as to his being deprived of the

the warranty by means of this error, he must look to that before he subscribes the policy.

1805.

* LE BLANC, J. declared himself of the same opinion, and that he was glad to be fortified in it by the authority of the case referred to. And added, that if the decision would induce underwriters and brokers to read policies before they were subscribed, and to see whether what was written contained matter of warranty or description, it would have a good effect.

LE MESURIER
against
VAUGHAN.

* [387]

Postea to the Plaintiffs.

MACFADZEN against OLIVANT.

Friday,
May 17th.

THE Plaintiff complained of the Defendant of a plea of *trespass*, and stated that the defendant on 1st of *January*, 1792, and on divers other days, &c. at, &c. with force and arms made an *assault* upon G. the plaintiff's wife, and then and there seduced her, &c. whereby the plaintiff during all the time aforesaid, lost and was deprived of the comfort, society, and fellowship of his said wife, and of her aid and assistance, &c.; and other wrongs to the plaintiff the defendant did, against the peace, &c. and to the damage of the plaintiff of 20,000*l.*; and therefore, &c. Pleas, 1. Not guilty of the premises aforesaid in manner and form as the plaintiff hath above declared against the defendant. 2. Not guilty of the premises in manner and form, &c. at any time *within six years* next, before the exhibiting of plaintiff's bill. Repliation joining issue on the first plea, and demurring generally to the second. Joinder in demurrer.

Where the plaintiff complained of a plea of *trespass*, for that the defendant with force and arms assaulted & seduced the plaintiff's wife, whereby he lost the comfort of her society, &c. against the peace, &c. to his damage, &c. &c. Whether this be *Trespass* or *Case* (and former authorities have considered it to be *case*) at any rate a plea of not guilty, *infra sex annos*, is good on general demurrer.

* *Wood*, in support of the demurrer, contended that the statute of limitations (a) could not be pleaded to an action

* [388]

(a) 21 Jac. 1. c. 16. s. 3. enacts, "that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and *replevin* for taking away of goods and cattle, all actions of account, and upon the case, &c. all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed, and not after; viz. the said actions upon the case (other than for slander, and the said actions for account, and the said action for trespass, debt, detinue) and *replevin* for goods or cattle, and the said action of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, &c. within four years next after the cause," &c.

1805. *of trespass for an assault and consequential damage, but that it was confined to trespass quare clausum fregit, or trespass for taking goods, which must be brought within six years after the cause of action; or to trespass for an assault and battery, &c. which must be brought within four years, and is confined to such actions brought by the party personally injured. That according to a MS. case of Cooke v. Sayer, (a) with which he had been furnished, the Court, in deciding the demurrer to the plea of the statute of limitations, considered the action as an action on the case, and not of trespass: which was a mistake, and was so noted to be in Batchelor v. Biggs. (b) He then read the following note—[“Cooke v. Sayer was an action brought by the husband against the defendant for criminal conversation with his wife. Plea not guilty within six years; to which there was a demurrer. The question was, If the action were trespass and assault, or case? if the former, the plea was bad; because it ought to be brought within four (c) years: if the latter, it was good. Curia (without hearing any argument) this was an action on the case. If it were trespass and assault, the wife must have been joined. Judgment for the defendant.”] 2dly, He contended, that supposing the statute of limitations was pleadable to such an action, the plea ought not to be “not guilty of the premises, &c. within six years,” but that the cause of action did not accrue within six years; the gist of the action being the consequential damage, namely, the deprivation of comfort, &c. As if assumpsit be brought upon a promise to do an act at a future day, which was not then done, the plea cannot be non assumpsit infra sex annos, but actio non accrevit infra sex annos. Gould v. Johnson. (d)*

Scarlett, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The cause of action in these cases arises from the time of the injury done by the

(a) This is shortly reported in 2 Wils. 85, and in Bull. N. P. 128; in which latter it is said, that “as the gist of the action is the criminal conversation, and not the assault, the proper plea under the stat. of limitations is not guilty within six years.” There is another report of it in 7 Burr. 733, which turns principally on the question of costs.

(b) 2 Blac. Rep. 855.

(c) It is to be remarked, that in the note in Bull. N. P. the word six is in *Italic*, as if the question had turned upon the distinction between that and some other period of limitation referred to in the statute.

(d) Salk. 422.

1805.

MACFADZEN
against
OLIVANT.

defendant by the corruption of the body and mind of the wife; for from that time she is less qualified to perform the duties of the marriage state. Then the question is, Whether this be an action on the case, or an action of trespass and assault? and it is said that the latter description only applies to personal assaults on the body of the plaintiff who sues: but nothing of that sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant *per quod servitium amisit*; and so by a husband for a trespass and assault of this kind upon his wife *per quod servitium amisit*. Then it is said that the case of *Cooke v. Sayer* was decided on the supposition that it was an action on the case. It might be material to consider that point if the question now were, Whether the limitations of *six* or *four* years only applied to this case? but if the defendant take the longer period, and plead not guilty within *four* years; and the plea, not having been specially demurred to, is, therefore, good in either way of considering it. I do not know what my opinion would have been if the point had now first arisen, Whether to have considered this as an action on the case or of trespass? but it having been considered in *Cooke v. Sayer* as an action on the case, I should be inclined so to consider it. But whichever it be taken to be, the bar equally applies to it.

[390]

LAWRENCE, J. (a) At any rate, it would be going too far to say that there is no limitation whatever to such an action as the present; and if there be a limitation of it, it must either be of four or of six years; and then the objection to the plea is resolved into a mere matter of form, which cannot be taken advantage of on general demurrer, but upon the question, Whether an action of this kind be trespass or case? besides, the case which has been referred to of *Cooke v. Sayer*, and where it is to be observed that the plea was in the same form as the present, there was another case of *Parker v. Ironfield* in this Court in *Hil. Term 19 Geo. 3*, in which the declaration charged, That the defendant, on the 1st of *November, 1777*, and on divers days and times between that day and the day of exhibiting the

[391]

(a) Mr. Justice Grose was not present in Court.

plaintiff's

1805.

MACFADZEN
against
OLIVANT.

plaintiff's bill, made an assault upon *Mary Parker*, the daughter and servant of the plaintiff, and debauched *Mary*, and carnally knew her; whereby he was deprived of her service. And Mr. Justice *Buller* has written on the back of his paper book, "This is an action on the case, and not of trespass; and, therefore, divers days, &c. proper." And then there is this further indorsement on the paper book, "Declaration for debauching daughter, that defendant on divers times, &c. assaulted, &c. good: for this is an action on the case: *aliter* in trespass for assault." (a) He, therefore, certainly considered it as an action on the case, and not an action of trespass and assault; but leave was here given to withdraw the demurrer on payment of costs.

LE BLANC, J. I had doubted whether the case just mentioned was decided on the ground of the nature of the action, having myself a very short note of it: but I considered that this was either an action on the case, or an action of trespass within the statute of limitations: for it would be very singular if this were to be considered as trespass of such a kind as to be taken out of so beneficial a statute; and in either way of considering it, the plea is a good bar.

Judgment for the defendant.

(a) *Vide post*, 395, *English v. Purser*.

[392]

Friday,
May 17th.

CAPP against TOPHAM.

An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and

ASSUMPSIT for money paid, laid out, and expended by the Plaintiff for the use of the Defendant. Plea, the general issue. At the trial at *Lincoln*, before *Heath, J.* a verdict was found for the plaintiff for 38*l.* 15*s.* subject to the opinion of this Court, on the following case:

written down by him on a piece of paper which was put under a candlestick at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the Acts of the 11 G. 3. c. 56, and 28 G. 3. c. 37; but being asked at the sale, Whether he had taken the proper precautions to avoid the duty in case there were no sale? he said, That it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty; held, that the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes under such circumstances; and the auctioneer having been sued for the duty on his bond to the Crown, and compelled to pay it, he could not recover it over against the owner, he having warranted that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken in the law.

The

The plaintiff, an auctioneer, was employed by the defendant to sell by auction an estate belonging to him in *Lincoln*; and the plaintiff, by the direction of the defendant, put the estate up to sale on the 27th of *January*, 1801. One of the conditions of sale was in these words: "That the vendor shall fix his price, and seal it up in a piece of paper; and if the biddings go beyond the price fixed, the estate shall be considered as sold; but if the biddings fall short of the sum so fixed on, the estate shall not be considered as sold." This was the auctioneer's own condition, and originally dictated by him; and adopted by him on this occasion as a proper mode to save the payment of the duty. The defendant's solicitor, who attended the sale previous to the commencement of the biddings, placed a ticket, with the privy of the auctioneer, containing the price in figures, and nothing more, under a candlestick on a table in the auction-room. *Bass*, the defendant's uncle, was present at the sale, on behalf of the defendant, and asked the plaintiff if he had taken the proper precaution to avoid duty if there was no sale? The plaintiff said it was his mode to fix a price under the candlestick; and if the bidding did not come up to the price, *it was no sale or duty*. There were several biddings for the estate, but the highest was under the sum specified in the said ticket; and the estate was by the auctioneer declared to remain unsold. The plaintiff had not given three days' notice of sale, and returned no sale. He was afterwards called upon by the collector of the excise to pay the duty, amounting to 29*l.* on the highest bidding, which he refused to do; but afterwards, on an action at the suit of the king being brought against him upon his bond for non-performance of his duty as auctioneer, he paid, to compromise the action, 29*l.* and 9*l.* 15*s.* costs. The plaintiff, previous to any proceedings against him, called upon the defendant's solicitor, and informed him of the demand of the duty made by the collector of the excise, and frequently requested the payment of it; but he refused. No notice in writing was given to the plaintiff of the price set down in the ticket; but the defendant's solicitor told him what it was. The plaintiff had no notice in writing of any bidding intended on account of the vendor, other than the aforesaid ticket and the conditions of sale, which was publicly read

1805.

 CAPP
 against
 TOPHAM.

[393]

1805.

CAPP
against
TOPHAM.

read in the auction-room by the auctioneer previous to the estate being put up to sale. At the time of the sale the defendant was a minor, and this the plaintiff knew; but he came of age before the money was paid by the plaintiff. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover?

[394]

Clarke, for the plaintiff, was proceeding to shew, That the auction duty had attached by the statutes 19 *Geo. 3. c. 56.* and 28 *Geo. 3. c. 37. s. 20*; (a) no notice in writing having been given to the auctioneer previous to the sale; and the ticket put under the candlestick not having been signed by the vendor as required by the Acts; and, therefore, that the plaintiff could not have resisted the action brought against him on his bond at the suit of the Crown, he not having accounted for the duty: and then by *s. 7.* of the first Act, the auctioneer may recover over from his employer the duties paid by him, and for which he is made chargeable by *s. 6.* And further, That the nonage of the defendant at the time of the sale could not render him less liable, the Act having made no exception of that sort; but

LAWRENCE, J. observed, That there was another view of the case which did not appear to admit of any answer; for, notwithstanding there was a course in which the sale might have been so managed as that no duty would have attached under the circumstances, the duty was incurred by the blunder of the auctioneer, who undertook to conduct the auction properly, so as to avoid incurring the duty without a sale; and now he seeks to make his employer suffer for his own blunder.

Clarke said in answer, That there was no warranty on the part of the auctioneer to be responsible for proper precautions to be taken to avoid the duty if there were no sale, though he were asked that question: but it was evidently a mistake of the law by all parties.

[395]

LORD ELLENBOROUGH, C. J. Where there is mutual error, each must take the particular inconvenience on himself which results from his own error. But here the defendant, who knew nothing of the manner of conducting a sale, trusted to the plaintiff, whom he supposed competent to

(a) *Vide* the material clauses of these Acts set out in *Cruso v. Crisp.* 3 East, 337.

his business; and in answer to the question, Whether the plaintiff had taken the proper precautions (evidently meaning those which the Acts of Parliament pointed out) to avoid the duty if there were no sale? the plaintiff stated what his mode was (which mode was adopted;) and he pledged, as it were, his experience, that, pursuing that mode, if there were no sale, there would be no duty attaching. He was mistaken in the law; and now he endeavours to make the defendant suffer for his own mistake.

LAWRENCE, J. I think there is sufficient evidence in this case of warranty by the plaintiff, that no duty would attach on his mode of conducting the business if there were no sale.

LE BLANC, J. agreed that there was evidence of such a warranty by the plaintiff.

Postea to the defendant.

Reader was to have argued for the defendant.

ENGLISH *against* PURSER.

Friday,
May 17th.

IN trespass and assault (a) the Plaintiff declared that the Defendant on the 20th of October, 1803, and in divers other days and times between that day and the day of exhibiting the bill, with force and arms, made an assault on the plaintiff, &c. To this there was a demurrer, assigning * for special cause, that the plaintiff ought to have charged the assault to have been made on a day certain, and not on divers days.

A declaration, charging that the defendant on such a day, and on divers other days and times, &c. made an assault on the plaintiff, held bad on special demurrer; as one assault cannot be laid on different days.

LORD ELLENBOROUGH, C. J. when the case was called on, said, That this precise point had been ruled in *Michell v. Neale*, (b) where this mode of declaring was holden bad on special demurrer.

* [396]

Wood, in support of the declaration, answered, That that case had been denied to be law by the Court of C. B. in a late case of *Burgess v. Freelove*, which he read from the report. (c)

(a) *Vide ante*, 391, *Parker v. Ironfield*.

(b) *Cowp.* 828.

(c) 2 *Bos. et Pull*, 425.

1806.

Exol'dn
against
PURSER.

Lord ELLENBOROUGH, C. J. There is this difference between that case and the present, that there the declaration stated that the defendant *assaulted* the plaintiff on divers days, which may mean that he committed so many different assaults on the different days; but here it is only alleged that the defendant committed *an assault*, which must be confined to some *one assault*, and that cannot be laid with a *continuando* on different days; though I confess the distinction between the two is very nice.

Runnington, in support of the demurrer, was not heard; and

The Court gave the plaintiff leave to amend, on payment of costs.

[397]

Saturday,
May 18th.

The King against The Inhabitants of MORTLAKE.

Where the son of a certificated person (not named in the certificate otherwise than under the general appellation of the father's family) marries and lives in a house of his own in the certificated parish, he ceases to be under the protection of the certificate as part of his father's family; and an apprentice may gain a settlement by serving such person in the certificated parish.

TWO justices, by an order, removed *Mary Dormer*, widow, and her several children by name, from the parish of *Mortlake*, in the county of *Surrey*, to the parish of *Great Marlow*, in the county of *Bucks*. The Sessions on appeal quashed the order (*pro forma*) in order to take the opinion of this Court, on the following case:

John Dormer and *Ann* his wife, being legally settled in the parish of *Hambledon*, in the county of *Bucks*, in *February*, 1700, went with a regular certificate from *Hambledon* to *Great Marlow*, in the same county, and during their residence at *Great Marlow* under such certificate, had a son born there, named *William*. Both *John* and *William* lived and died at *Great Marlow*, without having gained any settlement in that parish. *William Dormer* left his father's family, married, and occupied a separate house of 4l. a year in *Great Marlow*, and had a legitimate son named *Thomas*, who in 1760, being several years after the death both of *John* the grandfather and *Ann* his wife, was regularly bound apprentice to his father *William* by indenture for seven years, and served his apprenticeship under the same at *Great Marlow*. *Thomas Dormer* was afterwards married, and had a son named *Thomas*, now deceased, who was the husband of the pauper *Mary Dormer*, and the father of the four children

children removed with her by the order appealed against. The single question on the hearing of the appeal was, Whether, under the apprenticeship of *Thomas Dormer* the elder to his father *William Dormer*, and the stat. 12 Ann. c. 18. *Thomas Dormer* the elder had gained a settlement in *Great Marlow*,—*Thomas Dormer* the younger not having gained any settlement in his lifetime, and the paupers having no other settlement there than a derivative one under the said *Thomas Dormer* the elder, who had done no act to gain a settlement in *Great Marlow*, unless he did so by serving the abovementioned apprenticeship? The magistrates who heard the appeal (being twelve in number) were at first equally divided on this point; but one of the magistrates whose judgment was against the appellant parties, waved it, in order that a decision might be entered at the present Session, and the case be determined by a superior court. The appeal was thereupon allowed by the magistrates at Sessions, and the original order quashed, with 40s. maintenance, subject to the opinion of the Court of King's Bench on the above points.

1808.
—
The King
against
The
Inhabitants of
MORTLAKE.
[398]

The Solicitor General and *Marryat*, in support of the order of Sessions, admitted that *William* the grandfather of the pauper, and son of *John*, who originally came into the parish of *Great Marlow* with the certificate, was emancipated from *John*, by marrying and living separately from him; but contended that, notwithstanding such emancipation, *William* still continued to reside in *Great Marlow* under the certificate. That a certificate extends to the children of the certificated person, has been decided in a variety of cases from *R. v. Sherborne (a)* to *R. v. Alfreton. (b)* Then by the express words of the stat. 12 Ann. st. 1. c. 18. s. 2. "if any person whatsoever who shall be an apprentice bound by indenture to any person whatsoever, who did come into OR shall reside in any parish by means or licence of such certificate, and not afterwards having gained a legal settle-
ment (c) in such parish, such apprentice, by virtue of such apprenticeship, &c. shall not gain any settlement in

[399]

(a) Burr. S. C. 183.

(b) 7 Term Rep. 471.

(c) The means of gaining a settlement by such person in the certificated parish, are confined by stat. 9 & 10 W. 3. c. 11. to taking a tenement of 10l. a year, or executing some annual office in such parish.

such

1805.
 The KING
 against
 The
 Inhabitants of
 MORTLAKE.

[400]

such parish," &c. This extends as well to the party who comes into a parish by means of a certificate, as to all such as reside in it by means of such certificate: the words of the Act are in the disjunctive, "*come into or shall reside in.*" Now though after emancipation, *William* the son might, in conformity to the cases decided, be no longer said to have resided in the parish of *Great Marlow* under the certificate, yet he came into that parish by means of it, which is enough to exclude any person bound apprentice to him from gaining a settlement there. In *R. v. Alfreton* the son of a certificated person who was bound apprentice to another master in the same parish, could not gain a settlement there, even after he was emancipated by the death of his father: and in *R. v. Hampton*, (a) one who was apprenticed to the widow of a certificated man, whom she had married after the certificate granted, was also holden to be incapable of gaining a settlement by his service with her, notwithstanding the death of the certificated man before the binding. [The Court having pointed their attention to the cases of *R. v. Darlington* (b) and *R. v. Heath*, (c) in the latter of which it was expressly determined that the son of a certificated person marrying and living in a house of his own, ceased to be under the protection of the certificate, and might gain a settlement in the certificated parish in his own right.] They answered, that *R. v. Darlington* had only decided that grandchildren were not within the Certificate Act 8 & 9 W. 3. c. 30; and that neither in that case, nor in *The King v. Heath*, did the construction of the stat. of *Anne* with respect to apprentices come in judgment, as it did in *R. v. Hampton*, where the settlement by apprenticeship to the widow of the certificated man was negatived.

Lawes and *Barrow*, *contra*. The whole question turns upon the emancipation of *William*, the son of the certificated person; and when it was decided in *Rex v. Heath* that the son of a certificated person marrying and living apart from his father, was no longer protected by the certificate, but might gain a settlement in his own right, it necessarily follows that he may communicate a settlement to his apprentice notwithstanding the stat. of *Anne*, the object of which

(a) 5 Term Rep. 266.

(b) 4 Term Rep. 797.

(c) 5 Term Rep. 583.
 plainly

plainly was to prevent those who were themselves incapable, by means of a certificate, from gaining a settlement in the certificated parish, from communicating a settlement to others who served them either as apprentices or servants. And the case of *The King v. Hampton* turned altogether on the ground that the widow of the certificated man continued to be protected as part of his family by the certificate.

LORD ELLENBOROUGH, C. J. The question is, Whether *William*, the son of *John*, who was once covered by his father's certificate, ceased to be so when he married and lived separately from his father? for if he ceased to be covered by the certificate himself, there seems to be no reason why he might not communicate a settlement to another as well as gain one himself in the certificated parish. Whether he ceased to be covered by it himself, turns upon the meaning of the word *family* (a) in the stat. 3 & 9 W. 3. c. 30. which directs the certificated parish to receive the person mentioned in the certificate and his *family*. Taking that word in its largest sense, it would extend to cover all those who descended from, and were of the original stock; but that would have been a very inconvenient construction of the Act; the meaning of it therefore has been restrained, and in my opinion soundly and rationally restrained by the recent determinations in *R. v. Darlington*, and *R. v. Heath*, to those who constitute part of the existing household and family of the certificated person; or, as Lord *Kenyon* expressed it in *R. v. Darlington*, those who form his fire-side. How then can that character apply to *William* after he had married and left his father's house, and had become a new stirps, having a family of his own, in like manner as he had before been of his father's family. But it is said that the case of *Rex v. Hampton* has laid down a different rule with respect to apprentices. But that case was decided on the ground that the second wife continued after her husband's death to be the root and remains of the old family, and not a substantive distinct family, as here. She still continued as the representative of her deceased husband: but here the son had started for himself

1805.

The King
against
The
Inhabitants of
MORTLAKE.

[401]

(a) William the son was born after his father John went into the parish of Great Marlow, under the certificate. But where, in *Rex v. Testerton*, 5 Term Rep. 258, the son was named in the certificate granted to his father, it was holden that he still continued protected by it, though he afterwards married and lived separate from his father.

1805.

The KING
-against-
The
Inhabitants of
MORTLAKE.
[402]

as the head of a new family, by marrying and taking a separate house for himself. He was then in a condition to gain a settlement for himself in the certificated parish. But the words of the stat. of *Anne* are relied on, to shew that he is not such a person with whom an apprentice bound to him could gain a settlement there; and it is said that they are in the *disjunctive*, “come into or reside in;” but upon referring to the certificate Act, the 8 & 9 W. 3. c. 30. which speaks of persons who “shall come into any parish there to inhabit AND reside,” and the 9 & 10 W. 3. c. 11. which speaks of doubts having arisen upon the former statute, by what Acts “any person coming to inhabit or reside within any parish by virtue of any such certificate may procure a settlement,” and which enacts that no person who shall come into any parish (without more) by any such certificate shall gain any settlement there, except in certain ways mentioned,—I say, upon comparing the words of the statute of *Anne* with the former provisions, I think those words must be read *copulatively*, and that they mean only to designate persons who may come into any parish for the purpose of residing, and actually reside there under a certificate.

GROSE, J. The question is, Whether *William* came unto and resided in the parish of *Great Marlow* by means of the certificate granted to his father and his family, or whether he were in fact part of his father’s family at the time when his son *Thomas* served as apprentice with him? Now, what is meant by the father’s family was decided in *Rex v. Darlington*, and *Rex v. Heath*; and the situation of *William* at that time was that he had left his father’s house, was married, and had become a housekeeper himself, and was carrying on trade for himself. It is difficult to say what more would make a man cease to be part of his father’s family, if this would not. Then upon looking into the statute of *Anne*, and comparing it with the former Acts, I agree entirely with my Lord’s construction of it; and the case is neither within the words nor the sound sense of the Act.

LAWRENCE, J. I am of the same opinion. The case of *The King v. Sherborne* turned on considering the son as still continuing to be part of his father’s family; but here, according to the decisions in *R. v. Darlington*, and *R. v. Heath*, the son had ceased to be part of his father’s family before the apprenticeship to him took place. The object of the statute of *Anne*

Anne was to prevent burthens being brought upon a parish by apprentices or servants serving certificated persons, whose residence in the parish was protected by certificates; and that reason applied as well to all other persons who were protected by the certificate, while they continued part of the certificated man's family; but as soon as any of the children ceased to be a part of the father's family by being emancipated, the parish officers, if they thought that he was likely to encumber the parish, might have removed him before the late Act, and then all the mischief which was intended to be guarded against by the statute of *Anne* was done away, and it no longer applied.

LE BLANC, J. It is immaterial whether the master of the apprentice were settled in the parish of *Great Marlow* at the time; the only question is, Whether the master were, within the meaning of the statute of *Anne*, such a person with whom no apprentice could gain a settlement by serving him? And that depends on whether the master were part of his father's family at the time when his own son *Thomas* was apprenticed to him. Now at that time he had ceased to be part of the father's family; the family itself was at an end, and *William* the son was residing at the head of a distinct independent family of his own. He could no longer therefore be considered as residing under the certificate, because the certificate would not have protected him from being removed. Then there is no case which says that he was not such a person with whom an apprentice could gain a settlement. If this point had not been already decided in *Rex v. Darlington* and *Rex v. Heath*, I should not have hesitated to say now for the first time, that *William* was not a person residing under the certificate as part of the certificated man's family at the time when his son was apprentice to him.

Order of Sessions quashed.

1805.
—
The King
against
The
Inhabitants of
MORTLAKE.

[404]

1805.

Monday,
May 20th.

Cocks against HARMAN.

The Court refused to proceed summarily against a steward who was an attorney, to compel him to account before the Master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and to deliver up upon oath all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a mandamus to compel a steward of a manor to deliver up court rolls, &c.; in lieu of which this summary mode of proceeding has been adopted where the steward of the manor is an attorney.

* [405]

DAMPIER moved for a rule upon Mr. *Harman*, an attorney of this Court, to shew cause why he should not deliver to Mr. *Cocks*, as the heir at law, and only acting executor of *James Cocks*, Esq. his late father, deceased, an account of his receipts and payments in respect of a certain mortgaged estate, and why he should not deliver up upon oath all such deeds, papers, and writings as are now in his custody or power, relating to the said estate, together with the powers of attorney given to him by the said *J. C.*; and why it should not be referred to the Master to take the account; and why Mr. *Harman* should not pay the balance over to Mr. *Cocks*. This was moved upon an affidavit, that Mr. *Harman* had acted as steward to *J. C.* the elder, in which character these documents had been delivered to him, and that there was a balance now in his * hands: and he cited *Hughes v. Mayre*, (a) where the Court entertained summary jurisdiction over an attorney of the court in obliging him to deliver up court rolls, deeds, and writings, which had come to his hands as steward of a court and receiver of rents, on satisfaction of his lien. But

The Court refused the rule; distinguishing this from the former case, where the principal object of the application was court rolls; to compel the delivery of which from the steward to the lord, a *mandamus* would have lain. But this application, they said, was merely the subject matter of a bill in equity, and the Court had never yet gone so far as to do that by a summary rule which was the proper subject of a bill in equity, merely because the party against whom the application was made happened to be an attorney of the Court; the application not regarding his duty as an attorney. That the cases hitherto had only gone the length of substituting a more easy proceeding in lieu of the more expensive one by *mandamus*.

Rule refused.

(a) 3 Term Rep. 275.

1805.

MATHEW COWELL and JANE his Wife, Administratrix of *Monday,*
May 20th.
 BOWES, against WATTS.

THE Plaintiffs declared in the first count of the declaration in right of *Jane* (the wife) as administratrix of *T. Bowes*, who died intestate: for that whereas * the Defendant *after the death of the intestate*, to wit, on 1st of *May*, 1803, at *Westminster*, &c. was indebted to the plaintiffs in right of the said *Jane as administratrix* as aforesaid, in 50*l.* for a moiety of divers goods by the said *Mathew and Jane, as administratrix* as aforesaid, before that time sold and delivered to the defendant at his request; and being so indebted, the defendant, in consideration thereof, afterwards, &c. promised to the said *Mathew and Jane, as administratrix* as aforesaid, to pay them, &c. There was a second similar count on a *quantum valebant*. And the plaintiffs declared in a third count, that whereas also the defendant afterwards and after the death of the intestate, to wit, on the same day * [406] and year, &c. accounted with the said *Mathew and Jane*, as such administratrix as aforesaid, of and concerning divers sums before that time due and owing from the defendant to the said *Mathew and Jane, as such administratrix* as aforesaid, and being then in arrear, and upon that account the defendant was then and there found in arrear and indebted to the said *Mathew and Jane as such administratrix* as aforesaid, in the further sum of 50*l.* &c. the defendant in consideration thereof, on, &c. promised the said *Mathew and Jane as such administratrix* as aforesaid, to pay them, &c.; yet the defendant hath not paid, &c. After verdict for the plaintiffs, it was moved to arrest the judgment upon the ground of a misjoinder of counts, the first and second being for “goods sold and delivered by the administratrix after the death of the intestate,” where she must sue in her own right, however accountable afterwards for the application of the assets: and the third count being upon an account stated with the wife as administratrix, which could only be for debts contracted with the intestate.

Garrow and Marryat shewed cause against the rule. Sup- [407]
 posing that the two first counts must necessarily be con-
 Vol. VI. X sidered

A count upon a promise to the plaintiff as administratrix for goods sold and delivered by her after the death of the intestate may be joined with a count upon an account stated with her as administratrix; for the damages and costs when recovered would be assets.

1805.

COWELL
and Wife,
Administratrix, &c.
against
WATTS.

sidered as laid in the wife's own right, yet if any case can be put of an account stated with the administratrix, for money paid by her in her own time as administratrix for the benefit of the defendant, it will be sufficient to sustain the judgment; and the case put in *Ord v. Fenwick, Executrix, in Error*, (a) that she may have been compelled to pay money after the intestate's death, upon an obligation by him in his lifetime as surety for the defendant to a creditor, is that case; for that would be a good ground for laying the promise on an account with her *as administratrix*, though arising in her own time; and the money so recovered would be assets, in like manner as the produce of goods of the intestate sold after his death: so that all the counts would still be consistent. In *Henshall v. Roberts*, (b) it seemed to be considered that the cause of action in such a count as the third, would still appear to have arisen in the time of the administratrix; but there it was only laid to be an account stated with the plaintiff, *executrix*, &c. not saying *as executrix*. Here, however, all the counts are at least uniform upon the face of the record, in counting upon promises made to the wife *as administratrix*; though the plaintiffs might have been liable to costs if they had failed, because she might have declared in her own right; but that cannot affect the question in arrest of judgment. She might sell the goods of the intestate as administratrix, and the defendant might promise in writing to pay her for them in that character; and the defendant might also afterwards account with her in the same character for the value of the same goods. As in *King and others, Executors, &c. v. Thom*, (c) where the payee of a bill of exchange indorsed it to the plaintiffs *as executors*, it was holden that they might declare *as such* in an action against the acceptor. *Buller, J.* there said, that the only question was, Whether the sum when recovered would be assets. So in *Petrie and another, Executors, v. Hannay*, (d) a count for money had and received by the defendant to the use of the *executor, as such*,

[408]

(a) 3 East, 104.

(b) 5 East, 150.

(c) 1 Term Rep. 487, (contrary to *Betts, Executor, v. Mitchell*, 10 Mod. 316, which was not cited there;) and vide *Cockerill v. Kynaston*, 4 Term Rep. 277—281.

(d) 3 Term Rep. 659.

was holden to be properly joined with a count for money had and received to the use of the *testator*.

1805.

COWELL
and Wife,
Administra-
trix, &c.
against
WATTS.

The Solicitor General and *Wood* in support of the rule. Though the promises be laid in the two first counts to be made to a wife *as administratrix*, yet the defendant being stated to have become indebted to her after the death of the intestate for goods sold to him by her, it is clear that she could only sue for the price in her own right, and that the words added, "*as administratrix*," are mere surplusage, and must be rejected as inconsistent with the facts alleged in those counts. The defendant could not have set off to those counts a debt due to him from the intestate. On the other hand, an account stated with her *as administratrix*, on which the defendant is charged in the third count, could only be upon matters arising in the lifetime of the intestate: for if it were in respect of the goods sold by herself, as suggested, it would not be true that the defendant accounted with her *as administratrix*, but in *her own right*. The supposed case put in *Ord v. Fenwick* (a) is only applicable to a count for *money paid* by an executor to the use of the defendant; and the joinder of a count for money had and received to the use of the executor, with one for money had and received to the use of the testator, was approved in *Petrie v. Hannay*, merely on the ground of practice, without entering into the reason of it, or considering whether any facts could be combined which would warrant it, like the case suggested in *Ord v. Fenwick*, and which was the real truth of that case. [*Lawrence, J.* Where is the inconvenience of joining the counts in the present case? In *Rogers v. Cook*, (b) where a count in *indebitatus assumpsit* to *A. as administrator*, was holden not to be joinable with a count on an *insimul computasset*, the only reason assigned is, because the *costs* to be recovered are *entire*, and then the plaintiff can never distinguish how much he is to have as administrator, and how much he is to hold as his own. But here no such inconvenience can ensue; for though the administratrix might have sued in the third count on her own right, yet having sued as administratrix, and as the whole

[409]

(a) 8 East, 104.

(b) Salk. 10.

1805. sum recovered will be assets, the costs must necessarily be assets also.] No answer being given,

COWELL
and Wife,
Administra-
trix, &c.
against
WATTS.

[410]

Lord ELLENBOROUGH, C. J. I wish that the rule which was long ago laid down in *Bull v. Palmer* (a) had been abided by, That where the money when recovered would be assets, the executor may declare for it in his representative character. The same doctrine was again laid down in *Mason v. Jackson*; (b) and the same principle has been recognized in modern times in *King and Others v. Thom*; (c) and in *Cockerill v. Kynaston*, (d) by Mr. Justice Buller. In *King v. Thom*, the plaintiffs declared as executors upon a bill of exchange indorsed to themselves in that character; and it was holden well by the Court: and that such a count might be joined with other counts for money had and received by the defendant to the use of the plaintiffs as executors, and on an account stated with them as such; and yet no doubt the cause of action in the first count arose in the time of the executors; and the very reason assigned in *Rogers v. Cook*, as reported in *Salkeld* (which is not mentioned in the other reports (e) of the same case) why a count as executor cannot be joined with one in the plaintiff's own right, namely, because the costs to be recovered being entire, cannot be severed, shews that the principle of those cases is right; for where the costs when recovered will belong to the same fund which is to receive or pay the damages, there being no need of severance, the reason of the thing would warrant the joining of the counts. Lord C. J. Lee, indeed, in the case of *Hooker v. Quilter* (f) objects to *Salkeld's* report of *Rogers v. Cook* as coming on upon demurrer; for "That the defendant having pleaded a frivolous plea, when the Court saw the record they abated the writ, because there appeared two incompatible demands (in that, however, he could not have been accurately reported :) and he says, that the true reason was on account of the damages which were entire; and that the Court could not say what damages the

(a) 2 Lev. 165.

(b) 3 Lev. 60.

(c) 1 Term Rep. 437.

(d) 4 Term Rep. 231.

(e) 1 Show. 366, and Carth. 235. It appears by all the reports of the case, that the plaintiff declared in the count on the *insimul computasset* simply in his own name, not saying as administrator.

(f) 1 Wils. 179. The report in Carthew states it to have been on demurrer to the plea.

plaintiff was to have as administrator, and what *in proprio jure*." It certainly is the more convenient rule to say, that counts * may be joined where the fund out of which the damages are to come, or to which they are to be applied, is the same; but it must be admitted that the determinations have not been uniform to that extent; but the labour has often been to shew that the plaintiff was bound to sue in the same character in all the counts. Now, it cannot be said that the administratrix sold the goods after the death of the intestate in her representative character, though the promise may have been made to her in that character. All the counts, indeed, are founded upon acts done with the administratrix herself after the death of her intestate, and the promises must have been made to herself, though they may have been made in relation to the character with which she was invested. The last count states that the money was "due and owing from the defendant to the said Mathew and Jane," &c.; and in each count there is a specific promise alleged to have been made to *them*, though with reference to the wife's representative character. In each count, therefore, the promise may be considered as made to her in the *same* character: it is made to her *personally*, but connected with her character *as administratrix*. Therefore, there being the same consideration inducing to all the promises, and the promises being to the same persons in the same characters, I see no reason why they may not be joined in the same declaration. Whether the plaintiffs might have sued in their own characters is another question, affecting the right to costs, which may arise hereafter, and upon which it is unnecessary to say any thing at present.

GROSE, J. The best line to adopt in determining whether the counts may be joined, is to consider whether the sum when recovered would be assets. Now here the promises are all laid to the wife as administratrix, and all the damages will be recovered in her representative capacity; the counts may, therefore, be joined.

LAWRENCE, J. I think these counts may be joined. The reason why promises made to a plaintiff in his own right cannot be joined with promises to him in his representative character is, because the funds to which the money and costs to be recovered are to be applied, or out of which the costs

1805:

COWELL
and Wife,
Administra-
trix, &c.
against
WATTS.
* [411]

[412]

1805.

—
COWELL
and Wife,
Administra-
trix, &c.
against
WATTS.

costs are to be paid, are different. In one of the cases the reason given is, because the *costs* are entire; in another case, because the *damages* are entire: but neither of those reasons apply here; and where the sum recovered and the costs must be applied to the estate of the intestate, I think the counts may be joined. There has certainly been a contrariety of decisions on this subject; but it appears to me that those cases in which the rule has been laid down, that counts may be joined whenever the money recovered under them would be assets, afford the best guide to us. The question of costs is a matter of very different consideration, on which many of the contrary decisions have proceeded. The reason why an executor suing in his representative character shall not be liable to costs if he fail is, because he is supposed not to be cognizant of the contracts made by his testator; but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon them in his own right, there is reason why he should not be exempt from costs in case he fail in his action.

[413]

LE BLANC, J. The plain and intelligible line is, that the counts may be joined whenever the money when recovered would be assets. Then as the money to be recovered here in all the counts would belong to the plaintiffs in right of the representative character of the wife, there is no misjoinder of them; and I see no reason why the promises in the two first counts may not be laid as made to the wife as administratrix consistent with the truth of the case. As suppose the defendant had contracted in writing, that in consideration that the plaintiffs would sell to him certain goods which had belonged to the intestate, he promised that he would pay her for them as administratrix; and so with respect to the last count, the defendant may have accounted with the plaintiffs, or with the auctioneer for the price of the same goods; and upon such accounting, knowing in what right the goods were sold, he may have promised to pay her for them as administratrix. Therefore, where all the promises are laid to have been made to her in her representative character, and where the damages and costs when recovered are to go to her in the course of administration, I think these counts may be joined. Judgment for the plaintiffs.

TOWER

1805.

TOWER *against* CAMERON and KENNEDY.Tuesday.
May 21st.

THE Plaintiff declared as payee of a promissory note, dated 27th of *February*, 1798, against the defendants as drawers, whereby they promised to pay, two months after demand, to the order of the plaintiff 160*l.*; and averred, that she made no order for payment to any other * person, and demanded payment on the 19th of *April*, 1800; in consideration whereof, &c. the defendants promised to pay, &c. The declaration also contained the common money counts. To which *Kennedy* pleaded, in addition to the general issue, that the plaintiff ought not to *have or maintain* her aforesaid action thereof against him; because after making the said several promises in the declaration, if any, &c. viz. on the 9th of *December*, 1803, at, &c. he became a bankrupt within the meaning of the several statutes concerning bankrupts; and that the several causes of action aforesaid in the declaration mentioned, if any, &c. accrued, and each of them did accrue to the plaintiff before such time as he, *Kennedy* became a bankrupt, &c. and concluded to the country. To, this there was a demurrer, assigning for special causes, that it is not alleged in the plea that *Kennedy* became a bankrupt *before the commencement of the suit*; but, on the contrary, it appears by the plea that he became a bankrupt after its commencement; and that it does not appear that any commission of bankrupt had been awarded or issued against the said defendant upon his said bankruptcy, &c. or that he has obtained his certificate under such commission, and duly surrendered himself, and conformed as by the statute, &c. is directed, or that the certificate was allowed, &c. before the commencement of this suit; and also for that it is alleged in that plea, that the plaintiff ought not to *have or maintain* her action against him; whereas the matter of the plea appearing to have arisen subsequent to the commencement of this suit, it ought to have been pleaded in bar of any further maintenance of the said action; and should have been pleaded as a plea *puis darrein* continuance, and the trading, petitioning creditor's debt, bankruptcy, &c. should have been specially set forth. Joinder in demurrer.

The general plea of bankruptcy and the certificate given by st. 5, Geo. 2. c. 30. s. 7. may be pleaded, without averring that the bankruptcy happened before the commencement of the suit; but if it appeared at *nisi prius* that it happened after the action brought, it seems that the defendant could not avail himself of the defence under such a general plea; which is only given by the statute in case any bankrupt who has conformed to the law shall afterwards be arrested or impleaded for any debt due before such time as he became bankrupt.

* [414]

[415]

1805.
 TOWER
 against
 CAMERON.

Lawes, in support of the demurrer. The question resolves itself into the first cause of demurrer assigned, Whether the plea ought not to have averred that the defendant became a bankrupt before the commencement of the suit? for the stat. 5 Geo. 2. c. 30. s. 7. only gives this general form of pleading in a certain case; that is, "in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded for any debt due before such time as he became bankrupt;" in which case the statute says, "such bankrupt shall be discharged upon common bail, and shall and may plead, in general, that the cause of such action did accrue before such time as he became bankrupt; and may give this Act and the special matter in evidence." If, therefore, the bankruptcy happened after the commencement of the suit, it must be pleaded specially; and this is consonant to the general rule of law in other cases, that in every plea in bar, which is pleaded in chief, all the facts in the plea which go to sustain the bar must appear to have happened before the action commenced; and though a bankrupt who conforms himself to the law, even subsequent to the action, has a good plea in bar to the action, yet he must plead it with all its necessary circumstances as other bars at common law, and cannot avail himself of this general and compendious plea, except in the given case provided for by the statute, where the bankrupt shall be impleaded afterwards for any debt due before the bankruptcy.

[416] *Scarlett*, *contra*, was stopped by the Court, after having referred to *Willan v. Giordini*, B. R. Trin. 1782, (a) which overruled *Parish v. Salkeld*; (b) though the plea there having been put in after issue joined, was plainly a plea *puis darrein continuance*; and to *Miles v. Williams*, (c) where a similar plea upon the former statute of bankruptcy, 4 Ann. c. 17. s. 7. to the same effect was holden good.

LORD ELLENBOROUGH, C. J. It is enough in this case which comes on upon demurrer to say, that this is a plea given by the statute, and that every word required by the statute is to be found in the plea. All the rest is matter of evidence. If upon looking at the memorandum of the record at *nisi prius*, and at the certificate given in evidence,

(a) Co. Bank. Laws, 356. (b) 2 Wils. 139. (c) 1 Pr. Wms. 249.

I should see that the defence did not arise till after the action brought, I should say that the certificate did not apply to the plea so pleaded; and the result would be the same if it appeared upon the face of the record that the bankruptcy did not happen till after the action brought; but that does not appear to us at present.

LAWRENCE, J. If it turned out at *nisi prius* that the defendant was not a bankrupt till after the exhibiting of the plaintiff's bill, I should say that the certificate did not apply to this plea.

Per Curiam,

Judgment for the defendant.

1805.

TOWER
against
CAMERON.

[417]

The KING against NIELD and Seven Others.

Wednesday,
May 22d.

THIS was a conviction upon the stat. 39 and 40 Geo. 3. c. 106. s. 1 and 2. (the form of which is given in a schedule to the Act) which stated that on the 28th of November, 45 Geo. 3. the Defendants were convicted before J. L. and R. A. Esquires, two justices of the peace for the county of Lancaster, of having, on the 1st of November in the year aforesaid, at *Chalton Row*, in the county aforesaid (each and every of them then and there being workmen in the manufacture of cotton) been unlawfully concerned in the making of and entering into a certain agreement for the purpose of then and there controlling *W. Borrodaile*, &c. then and there carrying on the manufacture and trade of cotton spinning, as masters and partners, in the conduct and management of their said trade and manufacture: the said agreement not being a contract made between any master and journeyman or manufacturer, for or on account of the work or service of such journeyman or manufacturer, contrary to the form of the stat. 39 and 40 Geo. 3. intitled, &c.; and the said justices did thereby order and adjudge the defendants for the said offence to be severally committed to and confined in the common gaol for the said county for the space of three calendar months. The Sessions on appeal confirmed the conviction; which being removed into this Court by certio-

The stat. 39 and 40 Geo. 3. c. 106. enacts, that all agreements, &c. in writing or not, by any journeymen manufacturers for controlling any person carrying on any manufacture, &c. in the conduct thereof, &c. shall be illegal: and it gives a summary form of conviction in which the offence is required to be stated; held, that a conviction alleging generally that the defendants were concerned in entering into "a certain agreement for the purpose of controlling A. B." &c. without stating what the agreement was (even if a departure from the words of the statute in stating the agreement to be for the purpose of controlling, &c. instead of for controlling, &c. would not at any rate have been a fatal variance) was bad.

rari,

1805.

The KING
against
NIELD
and Others.
[418]

rari, objection was taken that the conviction ought to have set forth the agreement itself, in order that the Court might judge whether it were an illegal agreement for the purpose of controlling the master manufacturers within the meaning of the Act of Parliament; and that the form of conviction given by s. 12. of the Act, and set forth in the schedule, which directed *the offence* to be stated, did not dispense with the necessity of setting forth *the agreement*, which was the *corpus delicti*, but merely the evidence of it.

Scarlett now shewed cause against a rule for quashing the conviction. The statute meant to give a compendious form of conviction; and, therefore, it is sufficient in *stating the offence*, as required in the schedule, to state it in the enacting words of the statute; and any writing or conversation whereby the defendants bound themselves to each other to accomplish the purpose of controlling their masters is merely *evidence* of the offence, which, it is admitted, need not be set forth, and not the offence itself. In many cases the setting out of the agreement itself in words would not afford any help to the Court in construing the conviction. For the agreement, though intelligible to the parties themselves, and capable of being rendered so by collateral evidence to the magistrates who here supply the place of a jury, might yet have no reference in terms to the trade, however clearly the intent to produce the effect charged might appear from concomitant Acts, all of which it would be difficult if not impracticable to set forth: but the gist of the offence is the intent and purport of the agreement. This is very different from charging the offence of sending a threatening letter, which letter must be set out in the indictment; because unless it appear upon the face of the letter itself to contain threats of the sort described in the Act of Parliament, the offence is not within the Act; and no parol evidence can supply the deficiency. The like observation applies to the case of forgery: the instrument itself alleged to be forged must be set out *verbatim*, in order that the Court may see that it is such an instrument as the law has prohibited to be forged; but it is different in the case of an offence which may be collected from a variety of acts and words, which serve to explain the intent and purpose of the offenders; and this incongruity might ensue from requiring the agree-
ment

[419]

ment itself to be set forth, that if it did not purport on the face of it to control the masters, but could only be shewn to do so by averments, such averments would appear to be in contradiction to the agreement itself. In *Rex v. Fuller* (a) it was deemed sufficient in an indictment on the stat. 37 Geo. 3. c. 70. which makes the maliciously and advisedly endeavouring to seduce any soldier from his duty and allegiance to the King a capital offence, to charge generally that the defendant did "maliciously, &c. endeavour to seduce one *M. Lowe*," a soldier, from his duty and allegiance, without stating the means by which he so endeavoured. He also referred to a later case of the *The King v. Moors and others*, before all the Judges, on which he principally relied (which he stated very shortly;) where, in an indictment on the stat. 37 Geo. 3. c. 123, against administering unlawful oaths, it was holden not to be necessary to set forth the oath itself in the indictment. (b)

1805.

The KING
against
NIELD
and Others.

Erskine,

(a) 1 Bos. & Pull. 180, and one East's P. C. 92, S. C.

(b) The King v. Moors and others, MS. These defendants were tried at the Summer assizes, 1801, at Lancaster, before Lord Alvanley, C. J. of C. P. upon an indictment framed on the stat. 37 Geo. 3. c. 123, against administering unlawful oaths; the 4th count of which stated that the defendants, after the passing of that Act, viz. on the 12th of March, 41 Geo. 3. at Bolton, in the county of Lancaster, feloniously did administer, and cause to be administered to one John Howarth, a certain oath and engagement, then and there accordingly taken by the said J. H. and which oath and engagement was then and there intended to bind the said J. H., so then and there taking the same, not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or expression of his or theirs done or made, collectively or individually, in or out of that or other similar societies, in pursuance of the spirit of that obligation; against the form of the statute, and against the peace, &c. The 8th count charged that the defendants were aiding and assisting at the taking of a certain other oath and engagement then and there taken by the said J. H., and intended to bind the said J. H. so then and there taking the same not to give evidence against any associate in certain associations and societies of persons formed for seditious purposes, against the form of the statute, &c. or to be of any There were other counts for aiding and assisting, and others stating the objects of the oath administered, and the objects of the society differently and more generally, adapted to several prohibitory parts of the statute.

It was moved to arrest the judgment, because, 1st, the oath ought to have &c. or not to been set forth in such a manner that the prisoner might know what he was inform or give to defend himself against. 2. That such an indictment would be bad at common evidence law, and that though the 4th clause has dispensed with the words, the purport against any must still be set forth. 3. That at all events the other counts (besides the 4th and associate, &c.

it shall not be necessary in an indictment for any such offence to set forth the words of the oath, but it shall be sufficient to set forth the purport of it, or some material part thereof; held, that an indictment charging that the defendants administered to J. H. an oath intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or expression of his or theirs, &c. is good, without alleging the tenor or purport of the oath to be set forth, and without shewing in what manner the public peace was meant to be disturbed by such society.

8th.)

1803.

The KING
against
NIELD
[and Others.

Erskine, contrà (with whom were *Garrow, Yates, Ferguson, and Hardy*.) All the policy and convenience of the law, the certainty of justice, and the weight of precedents,

8th) were too general, in merely stating the object of the oath to be (in some) "to engage the party taking it in seditious purposes, and to disturb the public peace;" (and in others) "to be of a certain association of persons, the same being an association formed to disturb the peace; without stating what the seditious purposes were, or in what manner the peace was to be broken; there being the same reason for setting out the same as in an indictment for obtaining money by false pretences, where the false pretences used must be set out. *Rex. v. Lloyd* (a) 4th, That in no count of the indictment is any oath or the purport of any oath set forth, as required by the Act; 5th, That there is no *venue* laid as to the association or society mentioned in the indictment.

Where the witness swearing to the words spoken by way of oath by the prisoner when he had in his hands. Lord Alvanley was of opinion that no such notice was headministered the same, paper containing the oath was not produced. The following is a copy of the said, that he oath produced on the trial of Moors and Moseley: "In the awful presence of God, I A. B. voluntarily vow and declare that I will persevere in endeavouring in his hand at to form a brotherhood of affection among Englishmen of every religious community, and I will also persevere in my endeavours to obtain an equal, full, and when he administered the declare, that neither hopes nor fears, rewards nor punishments, shall ever induce me directly or indirectly to inform or give evidence against any of this which it was society, for any act or expression of his or theirs done or made collectively or supposed that individually in or out of this or other similar societies, in pursuance of the spirit he read the of this obligation." An objection was made at the trial to the admission of words; yet any parol evidence to shew the real object of the oath; which, it was said, held that par-must speak for itself: and that inasmuch as no seditious purpose appeared of evidence of upon the face of it, no parol evidence could be given to shew that the brother-what he in fact hood mentioned in it was of a seditious nature. But his Lordship was of said was sufficient opinion that declarations made at the time by the party administering such an cient, without oath were admissible to prove the real object of it.

giving him notice to produce such paper. Vide

Jacob v. Lindsey, 1 East, 460. Where the oath on the face of it did not purport to be for a seditious purpose, yet held that evidence might be given to shew that the brotherhood therein referred to was a seditious society.

(a) 2 East's P. C. 1122.

cedents, with the exception of the case last mentioned, are against this general form of conviction; and the only argument in favour of it is by imagining extreme cases, * where it might be difficult to frame a sufficient statement of an offence consisting of a variety of acts; but that difficulty, which can in every case be surmounted by pains and diligence, is no reason for breaking in upon a wholesome rule of law, which is even more necessary to be observed in convictions before inferior magistrates, than in indictments before the higher tribunals; namely, that every indictment or conviction should contain a charge of the offence with such certainty as that the Court may see that the offender is plainly brought within the law which he is alleged to have broken; so that an innocent person may not be condemned upon a misconstruction of the law, by an inferior tribunal, without any means of redress. The difficulties suggested would have applied as well to the case of a threatening letter; for that might require extrinsic averments, in order to bring it within the statute, *e. g.* a letter may only contain an intimation to the party, that if he did not do a certain thing which had been communicated to him before, the writer would do that which he had stated upon some former occasion, or which was to be found in such a page of such a book. Yet it cannot be doubted, that if the threat so conveyed were capable of being shewn by proper averments to be a threat of the kind prohibited by the statute 9 *Geo. 1. c. 22.* the case would fall within it. And in *Rex v. Lloyd (a)* it was said, that the indictment ought to set forth the letter itself, in order that it might appear to the Court to be a threatening letter within the Act; otherwise it would be leaving to the prosecutor to put his own interpretation upon the letter, and to the jury the matter of law. And this rule is not confined to written instruments only, as in the cases of threatening letters and forgeries, but is also required in indictments on the stat. 30 *Geo. 2. c. 24.* for obtaining money by false pretences. (b) So here, if the agreement be not stated, it will be leaving to the magistrates

1805.

The KING
against
NIELD
and Others
* [422]

[423]

In Michaelmas Term, 1801, the Judges, without giving any opinion against the other counts, all agreed that at any rate the 4th and 8th counts were good; and that the other objections made at the trial were properly over-ruled.

(a) 2 East's P. C. 1122.

(b) *Rex v. Mason*, 2 Term Rep. 58.

below,

1805.

The KING
against
NIELD
and Others.

below, to put their own interpretation upon it in point of law; and they may determine an agreement to be for controlling a master in carrying on his manufacture, which this Court, upon view of it, might hold to be perfectly legal, and not within the scope and intention of the statute. As if the defendants had been required to work on Sundays, and had entered into a resolution not to do so; this might truly be said to be a controlling of the masters in their trade, in the general way here stated; and yet such an agreement would be not only legal but laudable. The general form of conviction given by the Act was merely to supersede the necessity of setting out in the conviction all the evidence of the offence necessary to prove the charge, but not to dispense with a legal and certain description of the offence itself, which is required to be set out in the schedule; and the emendatory Act of the 41 Geo. 3. c. 38. does not alter the form of conviction in this respect. So in *Rex v. Jukes*, (a) a proviso in a penal statute that no conviction for any offence under that Act should be set aside for want of form, provided the material facts alleged were proved, was deemed not to dispense with the allegation of any material fact. At any rate, the substance of the agreement ought to have been set forth, without which the offence imputed to the defendant cannot be said to be stated. But if it be sufficient to state the offence generally in the words of the Act, at all events, those words should be literally pursued. Now the Act prohibits agreements *for controlling* any person carrying on any manufacture, &c.; but the conviction is for entering into an agreement "*for the purpose of controlling*," &c. And though the difference may seem to be small, yet in a case of this sort even a literal variance is important.

[424]

Lord ELLENBOROUGH, C. J. Where a statute (37 Geo. 3. c. 70) made the *endeavour* to seduce soldiers and sailors in the King's service from their duty and allegiance, an offence, it was decided in *Rex v. Fuller* not to be necessary to set out in an indictment for that offence the evidence by which that endeavour was effected; because it was considered that the *endeavour* to seduce, might consist of a variety of acts all originating in the same purpose, and tending to the same conclusion, forming altogether the offence described

in the statute by the word *endeavour*; and therefore that it was sufficient to describe it by the same word in an indictment. But I do not know any case where an offence consists in words or writing where the same general and compendious method of describing it has been deemed sufficient, without stating the words or writing necessary to constitute the offence. It is said, however, that the case of *The King v. Moors and others*, is an authority to that extent. I have no knowledge of the particular circumstances of that case, and therefore can give no opinion upon its application to the present. But giving full effect to the general statement which has been made of it, at least it may be collected that the indictment there pursued the exact description of the offence in the statute; whereas here there is a variance even in that respect. It is said, that the agreement in terms might be such as, if stated, would convey no information to the Court as to the object of it: but in whatever terms it were conceived, if the object of it were really such as to bring the case within the meaning of the statute, there could be no difficulty in shewing that by proper averments. For example, if the agreement by the journeymen were "to meet in a club at a public house for certain objects," the mere meeting there in pursuance of such agreement would not convey any information as to any object within the prohibition of the statute: but if it were also shewn that there was a rule of the club that the journeymen should meet there for the purpose of controlling their masters in their trade, the conviction ought to go on and incorporate that rule with the object of the meeting; for that would be a part of *the agreement*. In all instances where jurisdiction is given to inferior magistrates, in certain cases, it is necessary that the Court should see that they do not exceed that jurisdiction. The statute in question gives the magistrates a summary jurisdiction to repress agreements by journeymen *for controlling* their masters in their trade; they should therefore have stated what the agreement was, in order that the Court might see whether it were an agreement for controlling the masters in their trade within the meaning of the statute. And it is necessary to shew a criminal object, as well as a criminal intent. The only exception that occurs to me to the general rule is in the case of high treason, where the

1805.

The King
against
NIELD
and Others.

[425]

[426]

1805.

The KING
against
NIELD
and Others.

the crime lies in the intent; but there the overt act, by which that intent was manifested, must be stated; though if that overt act consisted of a letter, the contents of it need not be set forth. But here the offence does not consist in intent merely. It is not enough that the agreement should be *for the purpose* of controlling, that is, *with intent* to control; but it must be entered into *for controlling*, that is, for effecting that object; and I cannot say that this was such an agreement, without seeing what it was.

The other Judges inclined to the same opinion, but expressed some doubt upon the case, grounded on the authority of *Re v. Fuller*, and particularly on that of *Rex v. Moors and others*, which not having been fully stated, they wished to have an opportunity of looking at it; though they observed, that at any rate the conviction in this case had not pursued the very words of the Act, which in cases where a summary form was given, was at least the safest way. The case therefore stood over for this purpose till Saturday, when

Lord ELLENBOROUGH, C. J. said, that they had looked into the case of *The King v. Moors and others*, (a) which had been referred to in the argument, and they were all satisfied that the opinion which they had before formed was right. That the case cited had turned upon the particular wording of the Act of the 37 Geo. 3. c. 123.

Conviction quashed.

(a) Vide ante, 419.

[427]

Wednesday,
May 23d.

The KING against RUSSELL.

A waggoner occupying one side of a public street in a city, before his warehouses, in is proprietor of divers waggons for conveyance for hire of goods of others, to and from *Exeter*; and being such proprietor, he, with force and arms, on 1st of *January* 1802, **T**HE Defendant was found guilty at the last assizes at *Exeter*, upon an indictment for a nuisance, which stated that he, before and at the times after mentioned, was and still is proprietor of divers waggons for conveyance for hire of goods of others, to and from *Exeter*; and being such proprietor, he, with force and arms, on 1st of *January* 1802, and having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side ready for loading, is indictable for a public nuisance, although there were room for two carriages to pass on the opposite side of the street.

and

1805.

The King
against
RUSSELL.

and on divers other days and times between that day and the 8th of *January*, 1803, in the parish, &c. in the city and county aforesaid, without any just cause or excuse, but wrongfully and unlawfully, did cause and permit divers, viz. 20 waggons to stand and remain for a long time, viz. ten hours on each day before his warehouse, situate in a public street and highway, called *Southgate-street*, within such parish, city, and county, and divers cumbrous and other parcels, which had been conveyed, or were intended to be conveyed, in such waggons, to lie during such time scattered about such public street, to the great hindrance, impediment, and annoyance of all his Majesty's subjects passing and repassing such street, &c. The 2d count charged, that the defendant permitted divers waggons to stand in the said public street and highway, and there *to remain* before his warehouse for a long and unreasonable time, viz. &c. by which the King's subjects were during that time much impeded and obstructed, &c. There was a third count for similar nuisances, from the 8th of *January* to the day of the presentment. It appeared at the trial before *Thompson*, B. that one, or two, and sometimes three large waggons of the defendant, were for several hours, both day and night, standing in a street 37 feet wide before his warehouse, and usually occupied one half of the street, so that no carriage could pass on the opposite side, the gutter being in the middle of the street. That the waggons were loaded and unloaded in the street, and the packages thrown down on the same side of the street, so as frequently with the waggons to obstruct even foot passengers, and oblige them to cross the gutter to the other side. It was contended on the part of the defendant at the trial, that it was not every public inconvenience which was a nuisance. That partial obstructions of this kind, which arose out of the necessary means of carrying on trade and business in a populous city having narrow streets, and the access to houses necessarily confined, did not constitute a nuisance, the public passage not being impeded, though narrowed by such partial obstructions. That the same thing happened, though in a less degree, in the necessary carriage of goods to and from every tradesman's shop in a street; and it was sufficient if no unreasonable time were consumed in the

[428]

1805.

The KING
against
RUSSELL.

loading or unloading of the goods. The scaffoldings erected in the street before houses under repair, stood upon the same plea of necessity, though the passage were thereby greatly obstructed for the time. And the same reasoning applied to carriages stopping before the doors of inns and other places. The learned Judge, however, left the case to the jury upon the whole matter, and they found the defendant guilty. And now the defendant being brought up to receive judgment,

[429]

The Solicitor General, Praed, Serjt. and Dampier spoke in mitigation. They did not deny that the carrying on the business in the street, as had hitherto been done, in the manner proved, was a nuisance. But they endeavoured to distinguish between a systematic course of carrying on the defendant's business by loading and unloading his waggons as a matter of course in the street, and the doing it only occasionally when the press of business in so large a concern as that carried on by the defendant, who was the principal waggoner in the west of *England*, and whose establishment in trade was upon the largest scale, was such as to oblige him to do so for want of room in his yard within the site of his warehouses. And they offered, on the part of the defendant, to undertake that in future he would never have more than one waggon at a time standing in the street, and that only during the time necessarily consumed in loading and unloading it.

Lens, Serjt. and East for the prosecution (and *Clapp* was with them) contended, that the defendant was not entitled to carry on in the public street any part of his business, however large in itself and inconvenient to be carried on within his own premises; and said that the prosecutors, who had a public duty to perform, could not enter into such an agreement as that suggested, which left the defendant to judge of the necessity of using the street for carrying on his business, and was in truth consenting to the continuance of the very nuisance complained of, though in a less degree than what had before existed. That this was the same sort of claim on the part of the defendant as was some time ago set up by the coach-makers in *Long Acre*, who were desirous of placing their carriages out in the street before their shops for public view; but finding that they had no such right to

[430]

use the public highway, they desisted, and now exhibited their carriages by opening the fronts of their shops. They stated, that the sole object of the prosecution was to prevent a repetition of the nuisance.

The Court, then said, That it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and any thing which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business was such as to require the loading and unloading of so many more of his waggons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot: but the Court could not be parties to any compromise for his using the street as his own for any part of his business. That this was a species of nuisance to be found in many other places, and was fit to be suppressed; and, therefore, they directed that the defendant's recognizance should be taken for his appearance in *Michaelmas* Term next, if called upon, to receive judgment; and that either party should be at liberty to make affidavits as to what had been done to abate the nuisance in the mean time.

1805.

The KING
against
RUSSELL.

The KING against COGGAN and Another.

[431]

Saturday,
May 25th.

THE Solicitor General and Wood applied for a *mandamus* to the lord and steward of the manor of *Laleham* *Billets* to admit Mr. Williams to a copyhold tenement within the manor, which his father, to whom he was heir at law, was entitled to as a purchaser; but the father had died before admittance. (a) And they referred to *Rex v. facie legal title, in order to enable him to* *A mandamus lies to the lord and steward of a manor to admit one to a copyhold tenement who has a prima facie legal title, in order to enable him to* try his right, though equity had before refused to compel the lord to admit him, for want of his shewing an equitable right to the property; but if there be a claim of a previous fine due to the lord in respect of the ancestor from whom the party claims, the rule will only be granted on payment of such fine or fines as shall be due.

(a) Where the ancestor had been admitted, the Court, in *Rex v. Rennett*, 2 Term Rep. 197, refused a *mandamus* to admit the heir at law, since he had as complete a title without as with admittance, as against all the world but the lord.

1805.
 The KING
 against
 COGGAN
 and Another.

The Lord of the Manor of Hendon, (a) where it was granted, and to the constant practice of this Court in like cases, to enable a party to try his legal right.

Park and Marryat, on shewing cause now, referred to *Williams v. Lord Lonsdale*, (b) where the same title was in dispute in the time of a prior lord of this manor: in which the right of this Court to grant a *mandamus* in these cases was much questioned: and where finally the Lord Chancellor refused to interfere on behalf of the party now applying, on the ground that his father was only a trustee, and there was no person existing for whom he could claim to be admitted.

[432] Lord ELLENBOROUGH, C. J. said, That he was aware that the power of this Court to grant a *mandamus* to admit to a copyhold had been questioned on the other side of the hall; yet the Court having for many years past been in the habit of granting such writs upon a sufficient *prima facie* title made out on the part of the person applying, he could not doubt their power in that respect. That he had himself, when at the bar, frequently obtained such writs, in two or three instances, against the noble Lord who had been named (*Lord Lonsdale*) to compel him to admit tenants to copyholds.

The defendants' counsel then said, That they did not mean to deny the power of the Court (which had been exercised in a very recent instance (c) since the case of *Williams v. Lord Lonsdale*) to grant such a *mandamus*, where the party applying could make out a fair title; but this they denied could be done by Mr. *Williams* in the present case: and, therefore, there was no more reason for this Court to interfere than for the Court of Chancery, which had already refused a similar application on the ground of defect of right; but at any rate, they observed, that there was a previous fine due to the lord in respect of the father, who ought to have been admitted under the terms of the surrender, in right of whom the present applicant claims.

(a) 2 Term Rep. 434.

(b) 3 Ves. jun. 732, 4.

(c) This was a *mandamus* granted to the Duke of Leeds to admit Mr. Conolly, for the purpose of enabling him to try his title to certain customary tenements in the manor of Wakefield in Yorkshire, for which he afterwards brought an ejectment. *Vide* *Ree v. Conolly v. Vernon*, 5 East, 51.

Lord ELLENBOROUGH, C. J. The case in *Vesey* proceeded upon the ground that there was no equity in the party applying to the Court of Chancery to induce that Court to interfere; but it was there considered, that the legal estate was in the trustee, whose heir now applies; and that is sufficient for us to act upon in giving him an opportunity of trying his title, which is all that the admission will enable him to do. Therefore,

1805.

The KING
against
COGAN
and Another.

Per Curiam, upon Mr. Williams undertaking to pay such [433] fine or fines as shall be due to the lord,

Rule absolute for a *mandamus*.

PRICE, Bart. and Others against WOODBURNE.

Saturday,
May 25th.

THE *venue* in an action for goods sold and delivered, was laid in *London*, and was changed to *Lancashire* upon the usual affidavit, that the cause of action, if any, arose there, and not in *London* or *elsewhere out of the county of Lancaster*. The plaintiffs afterwards obtained a rule *nisi* to discharge the rule for changing the *venue*, upon an affidavit that the plaintiffs received an order from the defendant at *Lancaster* to send goods to him thither from *London* by the first *Lancaster* ship; in consequence of which, the goods which were the subject of the action, were shipped on board the first *Lancaster* ship which lay off *Griffin's wharf*, in the county of *Surry*; which goods were since acknowledged to have been received.

Though the *venue* be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county.

Littledale shewed cause against the rule, and objected to it, because it sought to bring back the *venue* to *London*, without the usual undertaking by the plaintiffs to give material evidence in that county. (a)

Burrough, *contra*, mentioned *Cailland v. Champion* (b) as in point as to the plaintiffs' right to bring back the *venue* where it had been removed upon a false affidavit; and also referred to *Collins v. Jacobs*, (c) and *Herring v. Durans*, (d) to the same effect; but he said, That the plaintiffs could

(a) *Vide* *Watkins v. Towers*, 2 Term Rep. 275. (b) 7 Term Rep. 205.
(c) 3 Bos. et Pull. 579. (d) 1 Wils. 178.

1805. not undertake to give material evidence in *London*, where the *venue* was first laid, because the cause of action arose in a third county, namely, *Surry*.

PRICE, Bart.
and Others
against
WOODBURNE.

Lord ELLENBOROUGH, C. J. The plaintiffs have brought this difficulty upon themselves, by having laid their *venue* at first in a wrong county, where no part of the cause of action arose; which prevents them from giving the usual undertaking always required, to enable a plaintiff to bring back the *venue* after it has been changed: and such being the general rule, it is better to abide by it; otherwise we shall have to try every cause, on a motion to change the *venue*; and there must be a rule to shew cause, instead of a rule absolute in the first instance to change the *venue*. Therefore, as the plaintiffs cannot undertake to give material evidence in the county where the *venue* was first laid,

Per Curiam,

Rule discharged.

Saturday,
May 25th.

FORTY against IMBER.

Where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. for two years and a quarter, ending at Christmas, 1803, the plaintiff held & enjoyed the premises as tenant thereof to A. B. by virtue of a certain demise &c.; to which the plaintiff pleaded in bar, that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the supposed demise *nudo et forma*, it is sufficient to entitle the defendant on a verdict on such issue, if he proved that the plaintiff held of A. B. from the 23d of October, 1801, and to recover for two years' rent.

IN replevin, the Plaintiff declared for taking his goods on the 29th *February*, 1804, in his dwelling-house at the parish of *St. Mary, Rotherhithe*, in the county of *Surry*. The Defendant, 1st, Made cognizance as bailiff of *Thomas Anderson* and *Jane* his wife; and because the plaintiff for a long space of time, viz. for two years and a quarter next before and ending on the 25th of *December*, 1803, and from thence until and at the said time when, &c. held and enjoyed the said dwelling-house in which, &c. 'as tenant thereof to * the said *T. A.* and *Jane* his wife,' by virtue of a certain demise thereof theretofore made,' at and under a certain yearly rent, viz. the yearly rent of 30*l.* payable quarterly, viz. on 25th of *March*, &c.; and because 67*l.* 10*s.* of the rent aforesaid for the said space of two years and a quarter, ending on the said 25th of *December*, in the year aforesaid, &c. were due and in arrear from the plaintiff to the said *T. A.* and *Jane* his wife, he distrained and avowed the taking as a distress. The defendant, 2dly, Made cogni-

zance as bailiff to *T. Anderson* alone, and avowed in taking in like manner for rent in arrear under a holding from him. 3dly, The defendant made cognizance as bailiff to *T. Anderson* and *Jane* his wife; and because one *M. Mitchell* for a long time, viz. for two years and a quarter next before and ending on the said 25th of *December*, 1803, and from thence until and at the said time when, &c. *held and enjoyed* the said dwelling-house, in which, &c. as tenant thereof to the said *T. A.* and *Jane*, by virtue of a similar demise from them to him; and because 67*l.* 10*s.* of the rent for the said two years and a quarter, ending as aforesaid on the said 25th *December*, 1803, &c. were due and in arrear from the said *N. Mitchell* to the said *T. A.* and *Jane*, he avowed the taking as a distress. The plaintiff in his plea in bar to the first cognizance, pleaded That he did not hold and enjoy the said dwelling-house in which, &c. as tenant thereof to the said *T. Anderson* and *Jane*, his wife, by virtue of the supposed demise thereof in the said first cognizance at and under the supposed yearly rent in that cognizance also mentioned, in manner and form as there alleged, &c.; and pleaded like pleas in bar to the other two cognizances; on which issues were joined. At the trial before *Heath*, J. at the last *Kingston* assizes, it appeared that the premises had been once holden by *N. Mitchell* mentioned in the third cognizance as tenant to one *Standfast*, under a lease for seven years from 1798; at 35*l.* a-year; and *Mitchell* underlett to *Forty* the plaintiff, who was in possession before and at the time of the conveyance to *Anderson* and his wife. The title of *Anderson* and his wife to the premises was established under a conveyance to them in fee from *Standfast*, by lease and release, dated 22d and 23d of *December*, 1801, in which the premises were described as then in the tenure or occupation of the plaintiff as tenant at will. It was thereupon objected by the plaintiff's counsel, that the avowry for two years' and a quarter's rent, ending at *Christmas*, 1803, upon an alleged tenancy of the plaintiff to *Anderson* and his wife for that period, was disproved by the evidence, which shewed that the holding under *Anderson* and his wife only commenced two days before *Christmas*, 1801; and, consequently, the plaintiff could not be said to have *holden and enjoyed* under a demise from them for two years and a quarter, ending

1805.

—
FORTY
against
INDEX.

[436]

ing

1805.

—
FORTY
against
IMBER.

ing at *Christmas*, 1803; neither could so much rent be due to them; and that the traverse comprehended the *enjoyment* as well as the holding *modo et forma* as alleged in the several cognizances; and a verdict was taken for the plaintiff, with nominal damages, with liberty to move to set it aside and enter a verdict for the defendant, if the Court should be of opinion with him upon the point. A rule *nisi* was accordingly obtained for that purpose on a former day, when *Lawrence*, J. observed, That nothing appeared to shew that two years' and a quarter's rent might not be due to *Anderson* and his wife; for the conveyance to them being before the *Christmas* quarter-day, the rent of the *Michaelmas* quarter preceding would be incident to the reversion.

[437] *Lawes* shewed cause against the rule, and contended, That the allegation in the defendant's cognizance and avowry, that the plaintiff for two years and a quarter, ending at *Christmas*, 1803, held and enjoyed the premises as tenant to *Anderson* and his wife, must be proved to the extent to which it was alleged; the plaintiff by his plea in bar having traversed the holding and enjoying *modo et forma*, both of which were material. At common law the avowry was entire; and the title must have been set out and proved as laid; and even since the stat. 11 Geo. 2. c. 19. the substance of the title must be stated. Where time or a sum certain is material to be alleged, they may be traversed (a) though laid under a viz.: (b) *aliter* where the whole laid is immaterial. (c)

Garrow, *Bayley*, Serjt. and *Richardson*, *contra*, were stopped by the Court.

Lord ELLENBOROUGH, C. J. It is unnecessary to revert to cases before the statute of the 11 Geo. 2. c. 19. s. 22. which meant to relieve landlords from the difficulties which they before laboured under in making avowries for rent, and gives the avowry and cognizance in as general terms as possible; and there has been no case since that statute where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled to recover for so much as was due: it is the constant

(a) *Symmons v. Knox*, 3 Term Rep. 63.

(b) *Vide Grimwood v. Barret*, 6 Term Rep. 460.

(c) *Osborne v. Rogers*, 1 Saund. 267.

practice ; and here too the defendant has made cognizance for rent due under the tenancy of * *Mitchell* during the same period ; and there is nothing which proves the holding an enjoyment out of him but what proves it to be in the plaintiff.

1805.

Forty
against
IMBER.

* [438]

Per Curiam,

Rule absolute. (a)

(a) *Vide Harrison v. Barnby*, 5 Term Rep. 248 ; where the avowant on an avowry for half a year's rent, had judgment for a quarter only, which was due.

The Bailiffs, Burgesses, &c. of TEWKESBURY against
DISTON.

Monday,
May 27th.

THIS was an action on the case ; and the first count of the declaration stated, that the Plaintiffs on 1st of *October*, 1802, and long before, were lawfully possessed of a certain market holden in *Tewkesbury* on every *Wednesday* throughout the year (except on *Christmas day* when it happens on a *Wednesday*) for the buying and selling of corn and grain, and other goods usually sold in markets ; and that by reason thereof (a) they were of right entitled * to a reasonable toll of all corn and grain brought into the said market to be sold and there sold on any such market-day, not being corn or grain sold in the said market by any freeman of the borough ; nor the corn or grain of any other person lawfully exempt from the payment of such toll, one peck, viz. two gallons

An action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold : alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale ; whereby the plaintiffs were prevented from taking their toll, is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiff's claim of toll, coupled with the fact of not paying the toll on demand afterwards, when the corn was delivered to the defendant in the same borough, but out of the market : for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance.

Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market and there sold.

* [439]

(a) It having been admitted in argument by the plaintiff's counsel, that toll was not incident to a fair or market, but was against common right, though the owner of the franchise might claim reasonable toll by grant or prescription, it was asked by one of the Judges, in the course of the argument, how the plaintiffs could declare that, by reason of their possession of the market, they were of right entitled to a reasonable toll ? to which it was answered, That this was the common form of declaring ; and reference was made to *Drake v. Wigglesworth*, Willes 654, and to other cases collected by Mr. Serjt. Williams in his note to *Coryton v. Lithebye*, 2 Saund. 113, a, and vide *Vernon v. Goodrich*, 1 Stra. 5.

and

1805.
 The Bailiffs,
 &c. of
 TEWKESBURY
 against
 DISTON.

[440]

and one quart of and for every 48 bushels of corn or grain, each bushel containing nine gallons of corn or grain, brought within the said market to be sold, and there sold, and so in proportion for a greater or lesser quantity than 48 bushels; yet, the defendant, well knowing the premises, but *fraudulently and maliciously intending* to injure the plaintiffs in this behalf, and to defraud and deprive them of their toll, and to hinder them from enjoying the benefit and profits of their said market in so ample and beneficial a manner as of right they ought, on *Wednesday* the 17th of Nov. 1802 (being such market-day) the defendant, not being a freeman of the borough, nor a person legally exempt from the payment of toll, wrongfully, injuriously, deceitfully, and fraudulently did buy in the said market in *Tewkesbury* from one *John Dobbins* (*J. D.* not being a freeman, &c. nor legally exempt from the payment of toll) 96 bushels of wheat *by sample*, i. e. of the same and like quality with a small parcel of wheat which the said *J. D.* then and there produced to the defendant and as for a sample of the said wheat so bought as aforesaid; *the said wheat* so bought as aforesaid, or any part thereof, not being in the said market at the time of the sale, nor brought by the said *J. D.* into the said market to be there sold; and the defendant well knowing that the said last-mentioned wheat had not been brought to the said market to be there sold, and was not in the said market at the time of his buying thereof: whereby the plaintiffs were prevented from taking, and did not nor could take the toll due to them as aforesaid from and out of the said last-mentioned wheat, as they might and should have done if the same wheat had been brought and placed in the said market by the said *J. D.* to be there sold; but lost and were deprived of the same toll, and could not have and enjoy their said market and tolls, &c. in so ample and beneficial a manner as of right they ought to have had, &c. The second count only varied from the first by alleging that the 96 bushels of wheat were bought by sample (without any explanation of the word *Sample*) and were to be delivered to the defendant in *Tewkesbury*. The third count claimed the toll on all corn brought into the market to be sold, and there sold on any market-day, and delivered *within Tewkesbury*; and alleged the sale by sample in the same manner as the second count, and was in other respects similar to the two preceding counts. The
 fourth

fourth count resembled the last in the claim of toll, and the mode of sale by sample; and alleged, that the corn in question had not been brought into the market to be sold, and was not in the market when bought by the defendant, but was to be delivered afterwards to the defendant on a future day agreed upon between him and the said *J. D.* The fifth count, stating the plaintiffs' possession of and right to the market and toll, as before set forth, alleged that the defendant, on *Wednesday* the 17th of *November*, 1802, being a market-day (the defendant not being a freeman, &c.) bought in the said last-mentioned market in *Tewkesbury* of and from *J. D.* (not being a freeman, &c.) 96 bushels of wheat, which had been brought by the said *J. D.* into the said last-mentioned market to be there sold, and then was in the said last-mentioned market to be there sold, by reason whereof the plaintiffs were entitled to receive from the defendant their toll due to them for and in respect of the said last-mentioned wheat so bought by him as aforesaid, viz. two pecks of the said wheat, being at the rate, &c. at and for the said toll. It then stated that the plaintiffs then and there demanded the said toll from the defendant, and required him to render and deliver the same to them: yet the defendant wrongfully intending to injure the plaintiffs in this behalf, and to defraud and deprive them of the said toll so due to them in respect of the said last-mentioned wheat so bought by the defendant as aforesaid, did not and would not then or at any other time render and deliver to them the said toll, or any part thereof, though requested, &c. The defendant pleaded the general issue, and the cause was tried before *Lawrence, J.* at the Summer Assizes at *Gloucester*, 1803, when a verdict was found for the plaintiffs on the before-mentioned counts of the declaration, with nominal damages, subject to the opinion of this Court, upon the following case:—

The plaintiffs have a market by prescription holden at *Tewkesbury* on every *Wednesday* in the year, except on *Christmas-day* when it happens to fall on a *Wednesday*, for the sale of corn and other articles. All corn brought into this market to be sold, and *there sold in bulk*, has from time immemorial paid a toll (*a*) to the plaintiffs of 12 *dishes*,

(*a*) It was agreed, on the second argument, that it should be inserted as a fact in the case, that the buyer had always paid this toll.

amounting

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[441]

1805. amounting to one peck on every 48 bushels, and so proportionally, more or less, according to the quantity. Until
 The Bailiffs, &c. of about 30 or 40 years back, all corn sold in the market was
 TEWKESBURY there pitched and sold in bulk. Since that period, a practice has gradually prevailed of selling in the market *by sample*; but in such case the customary toll of the corn has also
 against
 DISTON.
 [442] till lately been taken when the corn has been delivered in *Tewkesbury*. On *Wednesday*, the 17th of *November*, 1802, the defendant, not being a freeman of *Tewkesbury*, nor exempt from the payment of toll, *knowing* the plaintiffs' claim of toll upon buyers in their market as above stated, *bought by sample in Tewkesbury market* of one *J. D.* a farmer, who was neither a freeman nor in any other way exempt from the payment of toll, two loads of wheat to be delivered in *Tewkesbury*. At the time of the purchase, the wheat so bought by the defendant was in the barns of *J. D.* and the defendant knew that it was there, and that it had not been pitched in the market, or paid toll as if it had been pitched. Afterwards, viz. on the 18th and 20th of the same month, the said wheat was *delivered* to the defendant in *Tewkesbury*, but *out of the market*. Of this wheat the customary toll was demanded by the officers of the corporation; but was refused by the defendant. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court should be of opinion that they were entitled to recover, the verdict was to stand; if not, a non-suit was to be entered.

The case was first argued in *Trinity Term* last, by *Puller* for the plaintiffs, and *Abbot* for the defendant; but being then defectively stated, it was re-argued by the same counsel in *Michaelmas Term* following in its present form; and was again argued in *Hilary Term* last by *Williams*, Serjt. for the plaintiffs, and *Erskine*, *contrâ*.

Arguments for the plaintiffs.—It is not necessary to found this action on the case against the buyer that there should be fraud in fact proved against him; but it is sufficient that
 [443] the plaintiffs have sustained an injury by the act of the defendant in withholding the toll from them, which arises out of their right of market, and for which the defendant had an adequate consideration. The meaning, therefore, of the word *fraudulently* in the declaration, as applied to the defendant's

fendant's purchasing the corn *by sample* in the market, whereby the plaintiffs were prevented from taking their toll, is not that he was guilty of any circumvention or trick, but that the legal consequence of it was injurious to the plaintiffs as owners of the market. As in *assumpsit* the allegation that the defendant wrongfully and *fraudulently* refused to perform his promise has never been deemed necessary to be proved by shewing fraud in fact, but is taken as a legal consequence resulting from the breach of promise. In both instances it is merely inserted by way of aggravation; the gist of the action being the injury sustained by the plaintiff by the privation of his right. (a) There are frauds in law, such as those which occur under the bankrupt laws, as well as frauds in fact, and sometimes it is a mixed question: (b) in the first case there wants not the intervention of a jury, if there be such facts found from whence the legal conclusion of fraud or injury is inevitable. Where the party did not go into the market at the time of the injurious act imputed to him, it is a question of fraud in fact for the jury to find, Whether what he did were in fraud of the market? that is, Whether he fraudulently availed himself of the benefit of the market without actually coming into it? but where he actually went into the market and purchased tollable goods there *by sample*, without paying toll, which in its inevitable result must be injurious to the owner of the franchise, who was thereby deprived of his remedy by distress, the law notices the injury, without the intervention of a jury to find fraud in fact. Now here the facts are, that there was a sale in the plaintiffs' market of 96 bushels of wheat by sample, in which sale the buyer had the benefit of the market to resort to, in search of a seller of the commodity which he wanted, and whom he there found; and the seller had also a corresponding benefit. The buyer had there also a view of the sample to assist his judgment, and to compare with other samples; and he could have had no greater advantage if the corn had been carried thither in bulk, for he could still only have seen what was at the top of the bag,

1805.

The Bailiffs,
 &c. of
 TEWKESBURY
 against
 DISTON.

[444]

(a) Gilb. Hist. of C. B. 65.

(b) Eastwick v. Caillaud, 5 Term Rep. 426.

1805.
The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[445]

and he had the advantage of a warranty that the bulk answered to the sample: and both buyer and seller were benefited by the saving of the additional carriage of the commodity to market, a proportion of which would be saved by each in the price. Then, if both parties had all the advantages of a sale in bulk in the market, it is but just that the buyer, from whom the toll is due in that case, (a) should pay the toll, which is the legal consideration for the benefit of the market, according to the maxim *Qui sentit commodum onus sentire debet*; and the not doing so is a loss and injury to the lord of the market, and a fraud in law; especially where it is alleged and proved, as in this case, that the corn was so purchased by the defendant *with knowledge* of the plaintiffs' claim of toll; and that though the corn were afterwards delivered to him in consequence of such sale in the market, and that the toll were demanded of him, yet he did not pay it. Now, if one do an act which he knows must be injurious to another, he must abide the consequence; and the defendant's buying by sample, which prevented the corporation from taking the toll in specie, coupled with his knowledge of their claim and his subsequent refusal to pay it, constitutes in law a fraud upon their right to toll; but till the buyer had refused to pay the toll, no loss had accrued to them; which shews that the action is properly brought against the buyer, instead of the seller; and, indeed, the practice of selling by sample for 40 years past, would render it difficult to charge the seller by sample with fraud in fact; the cases which have been decided against the seller having been where the sale was *out of* the market, for the purpose of defrauding the toll. The word *fraudulently* is not necessary to be inserted in the declaration, unless it be the gist of the action. If one hold a new fair within seven miles of an ancient fair, the law presumes an injury, (b) and gives a remedy for it by action on the case; (c) and the language of the count (d) is, "That the defendants, knowing the premises, but *fraudulently* intending to oppress the

(a) *Vide* 2 Inst. 221, and 2 Lutw. 1336.

(b) 2 Roll. 140, and *Yard v. Ford*, 2 Saund. 172.

(c) *Fitz. and Abr. Action on the Case*, pl. 28.

(d) *Terry and another v. Page*, 1 Lill. Entr. 30.

plaintiffs,

plaintiffs, and to deprive them of their toll, without any lawful authority, unlawfully and injuriously held the new fair." Yet it is clear that actual fraud is not necessary to be shewn in order to sustain such an action; but it is sufficient, if brought within 20 years, to shew the possession of the old fair, and the erection of the new one within seven miles of it; and in a note to *Fitz. Nat. Brev.* 184, referring to 11 H. 4. 5, (a) it is said, "That if the market be on the *same* day, it shall be *intended* a nuisance; but if it be on *another* day, it shall *not* be so intended, and, therefore, it shall be put in issue whether it be a nuisance or not." The same allegation of fraud is to be found in counts in case for obstructing a watercourse, (b) for disturbing a right of common, (c) (where too the Act is laid to be done maliciously as well as fraudulently) and for not grinding corn at an ancient mill: (d) but in none of these cases is actual fraud necessary to be proved. In other cases (e) also the Court will look only to the substance of the action, and reject unnecessary words, which are merely introduced by way of aggravation. It is no objection to any form of action that it is new in specie, if it be not new in principle, as was observed by *Ashurst, J.* in *Pasley v. Freeman.* (f) The old remedy for not grinding at an ancient mill was by the writ of *secta ad molendinum*; but in modern times a new remedy by action on the case has been resorted to for protecting the right, which is better calculated to meet new evasions as they arise. So here, unless this new remedy can be applied, the right to toll for all bulky articles which are now sold by sample at market, must be abandoned altogether; but the principle on which this action is founded, has been established in various cases. Thus, stallage is properly due only for stands within the scite of a fair or market; yet if such as have houses near adjoining to the fair or market (which must be understood of houses built after the creation of the franchise) open their shops to sell their commodities there, stallage (or rather an equivalent) is due for that; for,

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[446]

(a) This and other notes in that book, referring to the Year-books, were added by Sir Wadham Windham, who was made a Judge of B. R. in 1660. *Vide* the Preface.

(b) Lib. Plac. 39. pl. 53.

(c) Lib. Plac. 33. pl. 4.

(d) *Winch's Entr.* 69, and *Coryton v. Lithebye*, 2 Saund. 114; and *vide* 1 Wils. 423.

(e) *Skinner v. Gunton and Others*, 1 Saund, 228.

(f) 3 Term Rep. 63.

1805. **The Bailiffs, &c. of TEWKESBURY against DISTON.** says the book, (a) they cannot take the benefit of the fair, without paying the duties which appertain to him who purchased it; and *tolnetum*, according to *Bennington v. Taylor*, (b) is a general word for all duties and payments in respect of a fair or market, including stallage, which are payable either by the buyer or seller. This then is a stronger case for the claim of toll, because here the sale was *in the market*, and not merely adjoining to it. In the *Newington Fair* case (c) no action could have been brought for *stallage*, *eo nomine*, because the goods were not sold *in the market*; the remedy could only have been by action on the case for the fraud practised in the selling the commodity in a house so situated, without paying the duty. Neither could trespass have lain, as in *The Mayor of Northampton v. Ward*, (d) where one without licence erected a stall upon another's market, and thereby broke the owner's soil. So here, though no action might lie specifically for toll, yet it lies for the injury done to the owner of the franchise for taking the benefit of the market without paying the duty. Again: It is laid down, (e) "That if a man have a market on one part of the vill of *D.* the inhabitants of the other part of the vill cannot erect new houses, and there in their houses and stalls sell merchandises; for that is to the damage of the market." That shews that the law regards the act itself as the damage; for *non constat* that the buyer would otherwise have bought such articles in the market: and the remedy must have been by action on the case. So, [448] the Prior of *Dunstable* (f) brought an action on the case against *J. B.* butcher, and declared that he was lord of the town of *D.* and that he, &c. had a market there twice a week, and the correction of the said market; and that all butchers, and all others who sold meat or any other commodity which came to the said market, ought to sell it in the high street of the said town upon the prior's stalls, paying *1d.* to the prior; and that the defendant was a butcher, and

(a) 2 Roll. Abr. 123. B. pl. 1. the case of *Newington Fair* in Cambridge. M. 15 Jac. I. in B. R. And *vide* 4 Com. Dig. 185. ut. Market, F. 2.

(b) 2 Lutw. 1519.

(c) M. 15 Jac. I. in B. R. 2 Roll. Abr. 123, B. pl. 1.

(d) 2 Stra. 1238.

(e) 2 Roll. Abr. 123. C. pl. 1. cites 2 Ed. 2. as admitted.

(f) 11 H. 6. 19. a. b. 25; and cited in the case of the City of London, 2 Rep. 127.

sold his meat on such a market-day within his own house, *occulte*, and had procured others so to do, by which the prior had lost the advantage of his stalls, and also the supervision of the market. The defendant at first pleaded, That he was an householder in *D.* and that all householders in the town had immemorially been used to sell their wares every market-day in their own houses, or wherever else they pleased: but *Cotesmore* held that such a prescription 'was not to the purpose; for if the prior had a market in the town, and was lord of the town, the inhabitants could not prescribe to sell meat in their own houses on market-day; for the market could only be in an open place, and the prior would lose the benefit of his toll if they might sell their wares in their own houses on market-days; neither could his officers superintend the market to see that the things sold there were lawful and vendible. The defendant therefore imparled to the next term, when he pleaded that the town of *D.* was an ancient borough, and that from time immemorial there was a custom there for all burgesses seised of houses in the town, adjoining to the high street, to sell their wares in their shops in such houses on market-days, &c. and so justified because the defendant was a burgess, and sold his meat in his shop so situated, &c. and traversed that he had sold it *occulte* in the manner supposed. (a) It does not appear there that the defendant's house stood in the market; but it is rather to be collected that the market was held in the high street; and the defendant's house was in a street adjoining: and the complaint is, that the goods ought to have been brought into the open market, and sold there upon the prior's stalls; and that the defendant's selling them in his own house adjoining the high street on a market-day, and thereby availing himself of the benefit of the market, without paying the accustomed duty, was an injury to the prior; and that the proper

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[449]

(a) Brooke's Abr. Prescription, 98, omits the *occulte*; but Lord Ellenborough observed, That the *occulte*, which imported fraud, was taken to be the gravamen of the action; for the traverse was taken on that, namely, that the defendant and the others did it secretly, and not openly, whereby the lord of the market was defrauded of his toll, and the public had not the benefit of the view of the commodity offered for sale in open market; and he afterwards observed, That in the result of the case it seemed to have been admitted that the defendant's house stood in the market, considering a sale in a house adjoining the high street as an extension of the market, and as a sale in the market for that purpose.

1805.
The Bailiffs,
&c. of
Tewkesbury
against
Diston.

[450]

remedy for this was an action on the case. So in *Blackey v. Dinsdale*, (a) where it was holden that a distress could not be made for the toll of goods sold out of the market, though fraudulently sold there to avoid the toll; yet Lord Mansfield said, That if that mode of sale were a fraud upon the toll, the remedy was by special action on the case; and he alluded to an instance of such an action brought by the City of London against persons for bringing corn just by their market, in order to avoid the toll. In confirmation of the same opinion, Lord Kenyon, in *Moseley v. Pearson*, (b) which was an action on the case for selling goods in a clandestine manner in a market, whereby the plaintiff was prevented from taking his toll in specie, said, "That if the plaintiff's demand had arisen on a contract of sale *by sample*, he would have brought a different kind of action, namely, an action for the fraud in not bringing the goods into the market." In this view of the case the action may be brought against buyer, or seller, or both: as where a wrong is committed by more than one, the party injured has his election to sue all or each; and if brought against two, one may be acquitted and the other found guilty. Even a possibility of damage to the owner of a market has been deemed to be a sufficient ground of action; and, therefore, said Powell, J. in *Ashby v. White*, (c) where one has a market and toll, and another is coming with goods to the market, for which, if sold, toll would be due, and a third person hinders him from coming to the market, an action lies for the lord of the market, because of the possibility of damage. So by Wylde, J. in *Turner v. Sterling*; (d) "If one have a beast-market and a toll for sale, and another hinder the beasts from going thither; though *non constat* whether they should be sold, yet for the possibility of that and of the loss of the toll thereon an action lies." And for this he cites 41 Ed. 3. 24. pl. 17. b. And the like was said by the Court in giving judgment in the case of the *Tunbridge Wells* dippers. (e)

Upon the 5th count (f) it was further argued, That in

(a) Cowp. 661.

(b) 4 Term Rep. 107.

(c) 6 Mod. 49.

(d) 2 Vent. 26.

(e) 2 Wils. 422.

(f) A verdict had been taken at the trial for the defendant on the 5th count, which alleges that the wheat was brought into the market to be sold, and there sold to the defendant, on an understanding on both sides at the time that the facts proved did not sustain that count; but it was afterwards agreed that the case should be argued upon the whole declaration.

order to protect the plaintiffs' right, the law by a fiction would consider the delivery of the sample in the market at the time of the sale as a symbolical delivery of the whole commodity in bulk, *pars pro toto*, in order to meet * the averment in this count, that the defendant had purchased wheat brought into the market. In like manner as by fiction of law a sale in a house adjoining to, and during the continuance of the market, is considered as an extension of, and a sale in the market, in support of the owner's right to toll: and the statute of frauds (*a*) considers a part-delivery as equivalent to a delivery of all the goods contracted to be sold. Then, upon the principle of relation, when the corn was afterwards delivered in bulk, in pursuance of the contract of sale made in the market, of which it was the perfection, the delivery related back to the time and place of the contract, and is to be considered as one entire act of sale and delivery in the market. Lord Coke, (*b*) speaking of sales in market overt, which shall bind the property of third persons, says, "That the *contract* must be originally and wholly made in the market overt, and not to have the *inception* out of the market, and the consummation in it." For this he cites *Dy. 99, b*; where one bought stolen beasts over-night for a certain price, and paid earnest, with an election to annul his bargain before noon the next day; and on the morrow he agreed to his bargain in open market, and paid the whole money, and also toll for the beasts; and held, that the property was not altered; because the *bargain* was made *out of the market*, and the assent given afterwards should *have relation to the first communication*; the seller being bound by the contract, and the buyer only having the power of dissolving it. [Lord Ellenborough, C. J. Is not the effect of that case rather this, that the policy of the law, which binds the property of another by sale in market overt, requires that every part of the transaction, as well the contract of sale as the delivery, shall take place in the open market, otherwise it shall not bind the property of third persons?] The rule laid down in 10 *Rep. 49, a*, is, That when to the perfection of an estate or interest divers acts or things are requisite, the law has more regard to the original

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

* [451]

[452]

(a) 29 Car. 2. c. 3. s. 17.

(b) 2 Inst. 713, 14.

1805.
 The Bailiffs,
 &c. of
 TEWKESBURY
 against
 DISTON.

act; for that is the fundamental part on which all the others are founded; and the like rule was given in *Haver-gill v. Hare*, (a) "That the execution of all things executory respects the original act, and shall have relation thereto, and all make but one act, though done at several times." So when one delivers an escrow to take effect as his deed upon the performance of a certain condition; upon the condition performed, it shall take effect from the first delivery, and bind by relation. *Bro. non est Factum*, pl. 5. So a bargain and sale, which is not perfected till enrollment, has relation back afterwards. [Lord *Ellenborough*, C. J. These are all authorities to shew relations back in point of time to the first act done: but they do not refer to local acts, from whence the parties are to derive local rights. How can an act done in one place be transferred by relation to another place, where the locality is to give it its effect? and How can any relation supply the fact of measuring by the hands of the meter to ascertain the toll?] Every fiction of law is against the truth of the case; but the law is astute in taking the symbol for the reality in support of right; and here the sample delivered is not negatived to be part of the corn contracted for, as it was in *Cooper v. Elston*; (b) and may, therefore, fairly be taken as a delivery of a part for the whole.

[453]

Arguments for the defendant.—What has been said in support of the 5th count is repugnant to the arguments urged in favour of the other counts; for these impute fraud either in fact or in law to certain acts of the defendant, which, it is said, prevented the seller from bringing the corn in bulk into the market, and thereby precluded the plaintiffs from taking their toll in specie, to the prejudice of their franchise;—whereas the argument upon the 5th count rebuts the imputation of such a fraud in evading the plaintiff's right of toll, by assuming that the corn was actually brought in bulk into the market, and that the toll became due upon the sale of it there; but alledging as the gravamen of the complaint that the toll which had become due on such sale was not paid by the defendant; which is a complaint of an entirely opposite nature from those stated

(a) Cro. Jac. 512.

(b) 7 Term Rep. 14.

in the other counts, and cannot be sustained by the same proof. It is sufficient, however, to answer that the 5th count is disproved by the facts stated: for the case states that the plaintiffs' right of toll is upon corn brought into the market to be sold, and there sold in bulk, and that the corn purchased by the defendant was not brought into the market; and consequently the toll, *qua toll*, did not accrue. The only question then which can be made, arises upon the other counts, Whether the mere act of purchasing corn by sample in the plaintiffs' market, without paying toll, can be imputed to the defendant as a fraud upon their franchise? Now, unless fraud in fact were proved and found by the jury; unless it could have been shewn that the defendant, by some trick, contrivance, violence, or conspiracy, prevented corn from being brought into the plaintiffs' market, which would otherwise have been carried there, in which case a presumption of loss of toll would arise, there is no authority nor principle for supporting an action of this nature, founded in tort, against the buyer;—and fraud in fact, not having been found by the jury, cannot be presumed. Legal inferences of fraud may indeed arise out of endeavours to evade positive obligations or restrictions imposed by law; but there was no previous obligation on the defendant to buy corn in bulk in this or any other market, nor was he restricted from buying it by sample: and nothing can be deemed a fraud in law, unless under all possible circumstances the act done must be fraudulent. It cannot then be deduced from an accidental, and for aught appears a necessary purchase of it by sample in a market, whither, it may be assumed, that the corn would not otherwise have been brought in bulk, or at least that the defendant did nothing to prevent the bringing of it there. The fallacy of the plaintiffs' argument lies in assuming that the mere fact of such a purchase by sample without paying toll, is an actual wrong to their franchise; which can only be substantiated by shewing an extension of their prescription, from a right to toll on all corn brought in bulk into the market, and there sold, to a right to toll on all contracts for the sale of corn made there, whether the corn be brought into the market or not. While commerce was in its infancy, it was convenient that the necessaries of life should be brought in bulk

1805.
The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[454]

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

to certain fixed places, whither the neighbouring people might resort to supply their wants with certainty; and for the placing of the commodity on the spot by the seller, and the convenience of receiving it there by the buyer, it was reasonable that a small toll should be paid. But this is an attempt to take advantage of a change of habits in the people, by drawing within the prescription executory contracts of sale which never were in the contemplation of the crown when the grant of these franchises was originally made, and on which it was not in the power of the crown to grant toll.

[455] Toll is not necessarily incident to a market or fair, but must be prescribed for. The right of holding markets or fairs was a royal franchise, originally granted to the lord of the territory where it was holden, though it may be severed from the soil. And in treating upon this subject, Lord *Coke* (a) throughout speaks of toll as applicable only to things brought to the market to be sold. And it is expressly said by *Powel, J.* in *Kerby v. Wichelou*, (b) that the king could not have granted toll upon goods not brought to the market. Nor would it be reasonable to extend the claim of toll over mere executory contracts of sale; for, at the present day, it is well known that large contracts are made in all public markets for the sale of corn at a great distance from the spot, much of it perhaps on shipboard, and imported from foreign countries, for the purpose of being distributed in different parts of the empire, according to the exigencies of government and the demand and supply of the people. Upon all which contracts, though the corn never was intended to be nor could perhaps be brought to the particular market where it was contracted for, toll would be demandable, to the great hindrance and burthen of commerce. On the contrary, the policy of the law has always been to keep these privileges strictly confined within their ancient limits; and, from early times, it appears (c) that complaints were made of "new tolls and exactions brought forward under the vizard of antiquity." Here the plaintiffs only prescribe for toll of corn brought into the market and there sold: and in the first four counts they state that the defendant, intending to defraud and deprive them of their toll, wrongfully, deceitfully,

(a) 2 Inst. 220, &c. (b) 2 Lutw. 1502. (c) 2 Inst. 222, 3.

and fraudulently bought corn in their market by sample; the corn so bought, or any * part thereof, not being in the market at the time of sale; by which they were prevented from taking their toll. The argument then of *pars pro toto* is wholly inconsistent with the plaintiff's own shewing, and with the very gist of their complaint; and no inference can arise in extension of their right of toll, so claimed and proved, from the practice of the last 40 years to take toll on corn sold by sample. But the very length of time during which that practice has prevailed, rebuts the imputation of fraud on the parties to this contract, and shews that the corporation themselves had acquiesced in this mode of dealing. And though it may be said that such acquiescence was given upon the faith that the toll would be paid, yet, if the contract were not fraudulent and injurious on the part of the seller, it could not be so in the buyer. As in *Holcroft v. Heel*, (a) it was holden that the grantee of a market, who had suffered another market to be erected and used in his neighbourhood for above 20 years without interruption, was by such acquiescence barred of his action on the case for a disturbance. The materiality of the word *fraudulently* in the declaration, appears from the general rule laid down by Lord Mansfield in *Rex v. Woodfall*, (b) that where any act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but that where the act is itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent. In this case the mere act of purchasing corn by sample in a market is plainly indifferent, and can only become wrongful and fraudulent when occupied with an express intent to circumvent and defraud the owner of the market of toll, which he would otherwise have obtained from the seller's carrying the corn into the market for sale; which fraudulent intent is not only not proved, but is rebutted by the fact that the corporation have countenanced sales by sample for 40 years past. In the *Newington Fair* case, (c) and in the Prior of *Dunstable's* case, (d) it was considered as a fraudulent extension of the fair and market to the adjoining houses, where the

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.
* [456]

[457

(a) 1 Bos. & Pull. 400.

(b) 5 Burr. 2637.

(c) 2 Roll. Abr. 123, pl. 1.

(d) 11 H. 6; 19, a. b. 25.

1805.
 The Bailiffs,
 &c. of
 TEWKESBURY
 against
 DISTON.

goods themselves, in respect of which the toll would have accrued, were sold in specie and delivered upon the spot; and which goods ought to have been brought into the open market for sale;—and there too, as in all the other cases, the actions were against the *sellers* who were guilty of the fraud. In *Yard v. Ford*, (a) the finding of the jury concluded that the new market was in fact a nuisance and detriment to the old market, near which it was erected, though holden on a different day in the week. So in the case put in *Ventris*, (b) the stopping the beasts in their way to the market, to *prevent their going there*, was an act directly injurious to the owner's franchise: but if the stopping had not been *eo intuitu*, no action would have lain. In *Blakey v. Dinsdale*, (c) Lord Mansfield did not consider the mere fact of selling by sample as a fraud in law; on the contrary, he said that if it were *really a trick*, the owners of the market must bring an action on the case: which shews his opinion to have been, that in order to sustain such an action, fraud in fact must be found in the defendant. Then in *Moseley v. Pierson*, (d) Lord Kenyon's observations, in allusion to a sale by sample without paying toll, that the plaintiff should have brought an action for the fraud *in not bringing the goods into the market*, it is plain could only apply to the *seller*; and from the very nature of the thing, it is evident that the fraud, if any, must be in the *seller*, and not in the *buyer* (unless where they conspire together;) for though the toll be payable by the hand of the buyer, yet it necessarily falls upon the seller, because he receives so much less in the price of the commodity on that account; and it would be a strange inference to make of fraud in law against the buyer, because the seller had not brought his commodity into the market. Besides, whatever mischiefs may arise from withdrawing corn in bulk from the market, they all fall upon the buyer. If it be expedient that there should be a public inspection of the commodity offered for sale, in order that it may be assured to be marketable, the buyer alone can suffer from the want of that precaution. So where the commodity, afterwards sold to an innocent purchaser, was first obtained by felony,

[458]

(a) 2 Saund. 172.
 (c) Cowp. 664.

(b) 2 Ventr. 26.
 (d) 4 Term. Rep. 10,—7.

he can only be protected by a sale of it in bulk in market-overt. At all events, however, the buyer of corn or other necessaries must follow the seller wherever he is, and must take them where and in whatever manner they are to be obtained; and the consumer cannot dispense with necessaries, because the seller does not choose to bring them in bulk to the market.

The Court directed the case to stand over for consideration: and in this Term

LORD ELLENBOROUGH, C. J. delivered judgment. The plaintiffs in every count of their declaration, except the last, complain of the defendant as a *buyer* in their market *by sample* of wheat *not brought into their market by the seller*, “whereby the plaintiffs were prevented from taking their toll out of the said wheat, as they would have done if the wheat had been brought into and placed in the said market.” In the last (the fifth) count, they complain of a non-delivery upon demand of the toll due upon a sale of corn, alleged to have been *brought into the market to be sold and there sold*, and which the count supposes to have been capable at the time of *specific render and delivery*. This count, however, and the very ingenious and learned arguments founded upon it, must be laid wholly out of the question, upon this simple ground, that it contains certain specific allegations of *fact* which are not in any degree sustained by the evidence stated. There was no such corn actually brought into the market to be sold, nor was any such corn there sold, nor did there ever exist any such physical possibility of rendering in kind the toll demanded, as the fifth count supposes. And although the delivery of the sample may be for some purposes a sale and delivery of that corn of which it is a part, or rather of the quality of that which it represents and exemplifies, yet its production in the market cannot operate as a production of the bulk actually sold, so as to generate in point of fact the consequences of such production, by affording the means of taking the toll specifically thereout; for no fiction or intendment of law, no symbolical transfer whatever, can operate to produce an effect merely natural, which can only be produced by natural means, namely, by the specific introduction of the commodity itself, in its proper form and bulk, into the place where the toll is demanded, and where the

count

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[459]

1805. count supposes it could (if the defendant had so pleased) have been specifically rendered. This count, therefore, failing for want of the proof necessary to sustain the material allegations of fact contained in it, the question must turn upon the other counts, which * complain of the defendant *as a buyer of corn by sample, in fraud of the plaintiff's right to a market toll.* The complaint made is of *the buyer only.* It is not a charge in the nature of a conspiracy against the buyer and seller jointly for an injury resulting to the plaintiffs, from their joint contrivance and concert, but from the supposed misconduct and *fraud* of the defendant, *the buyer, as such,* and which is stated to consist in the mere act of buying corn by sample which he knew at the time was not in the market. In this respect, the case is perfectly novel and unprecedented. Assuming, however, for the sake of argument, that the seller (whose case is very different from that of a buyer, but which it is not necessary at present to consider) would under the circumstances be liable to this species of action, as for a sale to the prejudice of the plaintiff's market, does it follow as a consequence that the buyer would also be so? The seller has it in his choice whether he will sell by sample or not a commodity not then locally brought by him within the limits of the market where the sale takes place: but the buyer may have no such election: he cannot compel the farmer to bring his corn in bulk to the market; and if he be restrained from buying any corn but what is actually brought into the market, he may be entirely precluded from buying of corn, by the discontinuance of all resort to the market by persons dealing in that commodity in bulk; he may therefore be driven to the necessity of buying of corn in this way, or of wanting it altogether. But it may be said, why should he not even in the case above supposed pay the toll, when he afterwards receives at *Tewkesbury* the corn he bought, out of which it may be rendered? In the first place, how will the subsequent non-delivery of the toll make the buying itself specifically fraudulent *ab initio*, unless the buyer had at the time of his purchase an original intention of withholding the toll; but which is neither alleged nor proved. Indeed, the practice which is stated in the case to have prevailed at *Tewkesbury* for the last 30 or 40 years, of selling by sample and delivering

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.
[460]

[461]

delivering the toll afterwards, would rather make the subsequent non-delivery of toll a fraud upon an implied contract to that effect with the lord of the market, than a fraud upon the right to a market toll: it would rather be a breach of contract or duty in depriving the lord of the market of the agreed substitute for his demandable toll, than of the toll itself. But, in the next place, why in justice, and on the ground of receiving the consideration for which the toll is payable, should the buyer in this case be required to pay it? The corn he has bought sometime before, by no fraud or contrivance of his own, it is true is delivered at *Tewkesbury*; but the correction of the market at the time and place of sale has been wholly lost to him in point of benefit: he had had no benefit from the previous view of the entire bulk exposed in the market-place; he has not had the advantage in reduction of price which frequently results to the buyer, from the seller's dread of being obliged to carry back his commodity in bulk unsold. Of these advantages it does not appear that he has been deprived by any act or consent of his own; or that he could have obtained his corn from the seller on any other terms, or by any other mode of sale and delivery, than that by which he has in fact received it. But, independently of these circumstances, by which the case of the buyer is distinguished from that of the seller (upon which latter case, *i. e.* that of the seller, we would not be understood as intimating any opinion) it does not, upon the facts stated, appear that the injurious consequence alleged to follow from the buying of corn under these circumstances, *viz.* the loss of a toll which the plaintiffs otherwise would have taken, has in fact followed therefrom. How does it appear that this corn, if not sold by sample, would ever have been sold in bulk in *Tewkesbury* market? and yet it should so appear by evidence sufficiently probable, as reasonably to induce this conclusion, otherwise the consequential damage, which is the foundation of this action, is unproved, and of course the action not maintainable. In this case cited by Mr. Justice *Powell* in his argument in *Ashby and White*, 2 *Ld. Raym.* 948, by way of instance of an action lying for possibility of damage, as by an owner of an ancient market for erecting a new market near his, says, "And yet perhaps the cattle that come to the old market might not be sold, and

1805.

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[462]

1805. so no toll due, and consequently no real damage ; but there is a possibility of damage." But this is at any rate a present injury to the rights of the old market ; it renders the estate of the market itself immediately of less value as saleable property in the hands of the proprietor. And in the other case of a market, stated in the report of this same case, 6 *Mod* .49, as having been put by *Powell, J.* : " Where one has a market and a toll, and another is coming with goods to the market, for which, if sold, toll would be due, and a third person hinders him from coming to the market,—action lies for the lord of the market, because of the possibility of damages." There the hinderance by the defendant is the only circumstance which is supposed to intervene between the lord and his toll, to prevent his receiving it. The case stated assumes that the person hindered would, but for the hinderance, have come to the market with his goods, and there have sold them ; in the happening of which two events a toll would have become demandable ; and the law in all cases proceeds upon proximate possibilities of this kind, as being *prima facie* sufficiently certain ; for if the hinderance were occasioned ultimately by any other circumstance, so that what the defendant did was only an attempt to hinder, and not an effectual hinderance, that might have been shewn by him in his defence, in order to repel the plaintiffs' claim to damages. In the present case no person was coming, or had indicated any intention of coming with the corn in question to that market, or to any other, to be sold ; nor was the proprietor of the corn induced by the defendant's act not to bring his corn to the market ; and the probable inference is, that if the corn had not been sold to the defendant, it would have been sold by sample to some other purchaser equally out of the market of *Tewkesbury*. This allegation therefore of special damage is sustained by no evidence sufficiently proximate to enable us to connect it with the act of buying, as the consequence and effect of such act. Upon this ground, therefore, we are of opinion, that this allegation also, viz. of damage occasioned by the act of buying, as well as the allegation that the buying itself was in fraud of the plaintiffs' right to a market toll, and with intent to deprive them of the same, is not made out in point of fact by competent evidence, warranting such conclusion in point

The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[463]

point of law; and on these accounts we are of opinion that judgment of nonsuit ought to be entered in favour of the defendant.

Judgment of Nonsuit.

1805.
The Bailiffs,
&c. of
TEWKESBURY
against
DISTON.

[464]

The KING against PHILIPPS.

Monday,
May 27th.

THIS indictment contained four counts, the first of which charged, that the Defendant, intending great bodily harm to one *R. G. Thomas*, and to break the peace, &c. and to provoke and excite him to fight a duel with the defendant, sent him a challenge to fight, contained in a letter, which was set out as after mentioned. The second count charged that the defendant endeavoured to provoke and incite *Thomas* to fight a duel with him, by writing the said letter, containing malicious and provoking matter concerning *Thomas*. The third count charged more generally that the defendant, intending great bodily harm to *Thomas*, and to break the peace, did provoke, excite, and challenge *Thomas* to fight a duel with him, without stating the letter. The fourth count charged that the defendant, unlawfully and maliciously, intending to do great bodily harm and mischief to *R. G. Thomas*, and to break the peace, &c. on, &c. with force and arms, at, &c. wickedly and maliciously did endeavour to stir up, provoke, and excite *Thomas* to challenge the defendant to fight a duel with him, *Thomas*, by then and there writing, sending, and delivering to him, *Thomas*, a scandalous, malicious, and provoking letter from the defendant to *Thomas*, to the tenor and effect following, viz. No. 28, *Orchard-street*, 1st June, 1803. Sir (meaning *Thomas*) It will, I (meaning the defendant) conclude, from the description you gave of your feelings and idea with respect to insult, in a letter to Mr. *Jones*, of last * *Monday's* date, be sufficient for me to tell you, that in the whole of the *Car-marthenshire* election business, as far as it relates to me, you have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any

leged in the indictment and proved: though it is sufficient to allege it in the prefatory part of the indictment. But where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor.

* [465]

appointment

1805.
 The KING
 against
 PHILIPPS.

appointment you may think proper to make (meaning that the defendant would punctually attend to any appointment that Thomas might think proper to make, for the purpose of his fighting a duel with and against the defendant, signed by the defendant;) with intent to stir up, *provoke*, and *excite the said* R. G. Thomas *to challenge the defendant to fight a duel with him, &c. against the peace, &c.*

The defendant was tried and acquitted on the three first counts, and found guilty on the 4th; on which a rule *nisi* was obtained by *Clifford* for arresting the judgment, on the ground that the last count did not charge the commission of any misdemeanour, but only an ineffectual provocation to another to commit one; being at most an endeavour only to do that which tended to a breach of the peace, but was not in itself a breach of the peace. That a direct challenge in writing was only a misdemeanour, as implying an intention in the challenger to fight, and thereby break the peace; and the jury must be satisfied of such intention, according to *Lewes v. Jeoffreys*; (a) but that for aught appeared here, the defendant's intent might only have been to provoke the prosecutor to challenge him, in order that he might bind him over to keep the peace; especially when by the verdict of acquittal on the other counts the jury had negatived an intention in the defendant to break the peace by giving the challenge. And he observed, that the case of *Lord Darcy v. Markham* (b) was decided in the Star-Chamber on the ground of its being a *compounded* misdemeanour; the letters which were dispersed by the defendant containing libellous matter, as well as a provocation to *Lord Darcy* to challenge him.

[466]

Erskine, *Garrow*, and *Abbot*, shewed cause against the rule on a former day of this Term; and admitting that an evil intention, without an overt act to carry it into effect, was not sufficient to convict the defendant of a misdemeanour, contended that the sending the letter stated in the 4th count, the intent and construction of which were put on the record by proper averments and innuendoes, found by the jury to be true, did constitute an offence in law, although the defendant's purpose in so doing was not effected,

(a) Foph 153.

(b) Hob. 120.

unless the Court were of opinion, which could not be supposed, that the letter upon the face of it was not capable of having such a meaning imputed to it. The objection supposes an innocent intent, namely, that the defendant did not mean to accept the challenge which he solicited, but only to bind over the prosecutor to keep the peace; but that is inconsistent with the intent charged in the 4th count, which is threefold: 1. To do great bodily harm and mischief to the prosecutor; 2. To break the peace; and, 3. in the conclusion, To provoke the prosecutor to challenge him. It is not therefore open to the defendant to assume any other or innocent intent. Besides, the sending a letter to provoke another to challenge the writer, and thereby commit a breach of the peace, must *prima facie* at least be taken to be done with an evil intent, unless the contrary be shewn; and if the intent be evil and unlawful, the act itself must necessarily be unlawful, whatever consequence may ensue upon it. (a) If the defendant could have shewn that he sent the letter with an innocent intent, or with any intent materially different from what is alleged, he would have been entitled to an acquittal. As on an indictment for a libel the defendant may shew that he read it innocently without knowing its contents. In the cases of *Rex v. Mackreth*, *Rex v. Bainbridge*, *Rex v. Rice*, *Rex v. Lord Camelford*, and *Rex v. Seaton*, all late cases of informations of a like nature with the present, the counts, to which the evidence in each case alone applied, were either in the same form, or at least not stronger in regard to the objection made than the present, concluding with an intent to provoke the several prosecutors to challenge the defendants; and no objection was taken. On general principles, an attempt to commit a misdemeanour in setting fire to a man's own house, was holden to be a misdemeanour *per se*. (b) So the attempt to bribe a privy counsellor to procure an office for the party. (c) And in *Rex v. Higgins*, (d) where an ineffectual solicitation of a servant to steal his master's goods was deemed to be a misdemeanour, and triable

1805.

The King
against
Philipps.

[467]

(a) *Rex v. Woodfall*, 4 Burr. 2667.

(b) *R. v. Scofield*, Cald. 397. The setting fire to a man's own house was then only a misdemeanour. But now, by the stat. 43 G. 3. c. 58. s. 1. the malicious burning of any house, whether in the possession of the offender or of any other, with intent to injure or defraud any person, is made a capital felony.

(c) 4 Burr. 2494.

(d) 2 East, 5.

1805.
 —
 The KING
 against
 PHILIPPS.

at the Sessions, as having a tendency to a breach of peace, Grose J. considered generally that an attempt to commit a misdemeanour was itself a misdemeanour: and in *Rex v. Scofield* a case was cited, before Adams, B. at *Shrewsbury*, which was recognized by the Court in *Rex v. Higgins*, where one was convicted upon an indictment for attempting to suborn another to commit perjury, which upon reference to the Judges afterwards was unanimously approved.

- [468] *Clifford*, in support of the rule. The Court can only look to the charge in the indictment, and see whether the law will infer a criminal intent from the act alleged to be done; or if the act being indifferent in itself, can only become criminal by being coupled with a criminal intent, whether such criminal intent be distinctly averred. Now here the act charged is alleged to be, not an actual *provocation* or *excitement* to the prosecutor to challenge the defendant, but only an *endeavour* to provoke and excite him to do that which, if he had done it, would have amounted at most only to a constructive breach of the peace. But it does not necessarily follow that the defendant intended to accept the challenge and fight the prosecutor, nor is it averred that he did so intend. If then there be any supposable case in which a party could make such an endeavour with a lawful intent, as if he did it with intent to bind the challenger to keep the peace, it is necessary to exclude such an inference, and to aver an unlawful intent in the defendant. Now here the unlawful intent is only stated by way of inducement in the prefatory part of the indictment, which has never been considered as equivalent to a direct averment. And in *Rex v. Higgins*, (a) *Lawrence*, J. quotes 2 *Hawk. ch. 25. s. 60.* as an authority, that the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intentment or implication whatsoever. It is, however, contended generally, that an attempt to commit a misdemeanour is itself a misdemeanour: but the cases adjudged do not support that proposition to that extent. An attempt to commit a misdemeanour of one sort, can only be itself a substantive misdemeanour where the act done is unlawful *per se*, if done with
- [469]

(a) 3 East, 20.

an evil intent, and leaves nothing to be done further by the party himself or by any other, in order to constitute a breach of the peace, or other known crime distinctly prohibited by the law. In high treason, the bare solicitation of another to commit a traitorous act, makes the tempter a principal. In felony, the adviser would be a felon if the felony were committed, though out of his view and without his knowledge at the time. The motive accompanying the advice in such a case must necessarily be bad; and therefore in *R. v. Higgins* it was considered that the mere solicitation, which, had it been effectual, would have made the solicitor a felon, at all events was a misdemeanour, when the attempt was fruitless. But in *Rex v. Scofield*, (a) where the act of putting the candle under the staircase of the party's own house, might or might not be criminal according to whether the intent were evil or indifferent, the indictment, besides the prefatory imputation that the defendant unlawfully and maliciously, &c. intending, to burn the house, did the act, contained a distinct averment that he did so place the candle "with a wicked and malicious intention, by means thereof then and there feloniously to set fire to the house," &c. So the subordination of perjury is a known substantive offence; and every attempt to suborn, whether effectual or not, must necessarily proceed from a depraved and evil mind. The very attempt is an endeavour to subvert the due course of justice. But in *Regina v. Langley*, (b) where one was indicted for opprobrious words spoken to the mayor of Salisbury, viz. "You are a rogue and a rascal," but not alleged to be spoken to him in the execution of his office, *Powell*, J. thought that the words being spoken to the mayor's face, tended to a breach of the peace, and so were indictable without reference to his office: but *Holt*, C. J. said, "they are not a breach of the peace, but they may provoke to it." *Powell*, J. afterwards said, "words that tend directly to a breach of the peace are indictable:" to which *Holt*, C. J. answered, "Yes, if one man challenge another." And finally the indictment was quashed. It appears, therefore, that the Court considered that words, not amounting to a challenge, but only tending to provoke it, had not such a

1805.

—
The KING
against
PHILIPPS.

[470]

(a) Cald. 397.

(b) Salk. 697, and 2 Ld. Raym. 1029.

1805.

The KING
against
[PHILIPPS]

necessary tendency to a breach of the peace as to be in themselves indictable.

Cur. adv. vult.

[471] Lord ELLENBOROUGH, C. J. now delivered judgment. This was an indictment containing four counts; the three first of which charged the defendant with having sent to a Mr. *Thomas* a challenge to fight with him: on these the defendant was acquitted; and the question arises upon the last count, upon which he was found guilty. [His Lordship, after stating the fourth count, proceeded.] The question which has been made upon the motion in arrest of judgment is, Whether the count so framed contain in itself a sufficient charge of an offence indictable by the law of the land? It has been argued on the part of the defendant, that the offence amounts to no more than an endeavour to provoke a person to challenge the defendant to fight a duel with him, with intent so to provoke him: and that although the sending a challenge to fight may, on account of its direct and immediate tendency to a breach of the peace, be an indictable offence, yet that a mere endeavour to provoke a person by a letter so to do, such endeavour not in itself having a direct and immediate tendency to a breach of the peace, nor being alleged to be done or used with that intent, but having only a tendency to provoke a challenge, and a challenge having only a tendency to a breach of the peace, and not being of itself a breach of the peace, was too remotely dangerous to the public peace to be a subject of indictment as a substantive misdemeanour. And the case of *The Queen* and *Langley* (*Sall.* 697. 6 *Mod.* 124, and 2 *Ld. Raym.* 1094.) which was the case of an indictment for saying to a mayor that "he was a rogue and a rascal," and which words were held not indictable, because they did not tend directly to a breach of the peace, has been relied on. And yet in the report of this very case in *Salkeld*, the distinction is taken by *Holt*, C. J. that "if these words had been written, an indictment would have lain;" for, as was said in 2 *Ld. Raym.* 1031, S. C. that is a libel. It will be recollected, that in the present case the provocation was administered by words written, and that the words, "You have behaved like a blackguard," give the character of a libel to the letter in question. But it appears to me that the first proposition contended for, viz. that such an endeavour as has been used on this occasion to provoke another to com-

mit

1805.

*The King
against
Philipps.*

mit the misdemeanour of sending a challenge, is not itself a misdemeanour, cannot be sustained. Although the intended effect may not have been produced, yet the means calculated and likely to produce such effect have been used. The letter was as much an act done towards the misdemeanour meant to be accomplished in this case, namely, a challenge, as it was in the case of *The King v. Vaughan*, where the misdemeanour meant to be accomplished by the letter, offering a bribe to a minister of state, was the inducing such minister corruptly to recommend to an office of public trust. The means in each case were equally proper to effectuate their respective purposes, and prosecuted to the same extent. And if the sending of the letter in the case of *The King v. Vaughan* to solicit a party to commit that misdemeanour were properly held indictable, I am at a loss to see any reason why a letter sent to provoke and excite a person to the commission of the offence in question is not equally so. It can surely make no difference that a different passion is meant to be operated upon in the one case and the other, and that the solicitation or provocation was addressed in the one case to the supposed avarice; in the other, to the supposed anger of the party; and that the end proposed to be ultimately effected in one case was a corrupt appointment, and in the other a duel. But the defendant's counsel has in his argument taken for granted that this indictment contains no allegation of the intent with which the letter was sent, except that which follows the statement of the letter, and with which the indictment concludes, viz. "with intent to provoke, &c. Mr. Thomas to challenge the defendant to fight;" and which he contends, upon the grounds already considered, not to have a sufficiently direct and immediate tendency to a breach of the peace. Upon referring, however, to the introductory part of the indictment, and construing it according to the rule laid down by Lord Mansfield in *The King v. Woodfall*, 5 Burr. 2667, and which has been adopted also and acted upon in many other cases, there will be found an actual allegation of intent, connected with the sending of the letter in question, viz. "of doing bodily harm," and "of breaking the king's peace." Admitting that in general the epithets in the indictment, as "wickedly and maliciously," &c. are, as Lord Mansfield says

[472]

1805.

The KING
against
PHILIPPS.

[473]

in *The King v. Woodfall*, “mere formal inferences of law from the act,” yet, unless an allegation of intent be conveyed by the word intending in the place where it usually occurs in indictments, many acts, which, but for an allegation of the intent with which such acts are done, would be merely indifferent, must still be construed to be so on the face of many indictments: but I think that the material criminal intent in such cases is to be considered as alleged in this prefatory part of the indictment. Lord *Mansfield* there says, “That where an act in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved (a) and found: but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent.” Now the intent cannot be proved and found, so as to sustain the indictment, where a criminal intent is necessary to accompany the act, unless the intent be also therein *alleged*. But it is no otherwise alleged than it is in this instance in a multitude of cases which have undergone much discussion, and in which judgment has been given for the Crown. In the case of *The King and Horne, Cowp. 672*, although many other objections were taken to the information, it was never objected that the criminal intention was not sufficiently averred by the introductory words of “seditiously intending to excite sedition amongst the king’s subjects, to alienate their affection and allegiance, and to cause it to be believed that divers of his subjects had been murdered in the province of *Massachussett’s Bay* by the king’s troops, and to encourage his subjects in the said plantation to resist the king’s government.” It may be said, however, that in that case the criminal intent was necessarily implied from the publication, and therefore that any averment thereof was superfluous: but in the case of *Rex v. Critchley* (cited in *Rex v. Topham, 4 Term Rep. 129.*) the intent to stir up hatred and ill-will against the family of Sir *C. G. Nicoll*, deceased, who was the subject of the libel, was material to be averred, in order to sustain that indictment, and was only averred in the introductory words of the indictment; and for the want

[474]

(a) *Qu.* If Lord *Mansfield* did not mean to say alleged and found,

of similar words containing an averment of intent in the prefatory part of the indictment, like that which is to be found in *Rex v. Critchley*, the indictment in *Rex v. Topham* was held not maintainable, and judgment was thereupon arrested. Since the argument of this case, we have inspected the original indictment in the *Queen v. Langley*; and there I find the intention laid thus: "*Quod Willelmus Langley, existens persona inquietæ et turbulentæ dispositionis, et machinans et intendens Wm. Waterman majorem civitatis prædictæ et auctoritatem suam in contemptum et odium inducere, 20th April, &c. in præsentia et auditu diversorum subditorum, &c. hæc maliciosa, scandalosa, et contemptuosa Anglicana, verba sequentia pronuntiavit et publicavit, viz.*" &c. There no objection was taken to the mode of averring and charging the intent, but only that the words uttered, even with such intent, were not indictable. If any particular bad intention accompanying the act be necessary to constitute it a crime, such intention should be laid in the indictment. In many cases the allegation of intent is merely a formal one; being no more than the result and inference which the law draws from the act itself, and which therefore requires no proof but what the act itself supplies; as in the case of libels where the fact of publication is not in question. But where the act is indifferent in itself, the intent with which it was done then becomes material, and requires, as any other substantive matter of fact does, specific allegation and proof. And after verdict every material allegation in the indictment must be taken to have been proved. To apply this to the present case, the alleged intent "of doing bodily harm and breaking the king's peace," is either a legal result from the letter of provocation and insult in which it is conveyed, and in that way is self-proved; or it is an allegation of fact requiring extrinsic evidence collateral to the letter itself, and which proof, upon the present motion in arrest of judgment, it must be presumed to have received at the trial. The fact of such intention, whenever it is required to be established by collateral evidence, is of course liable to be rebutted by contrary evidence: and if the defendant could on this occasion have shewn that he wrote the letter with the innocent and even meritorious views with regard to the public peace, which have been suggested on his behalf; as for instance, to provoke a challenge from a person known to harbour latent purposes of a malicious and dangerous kind

against

1805.

The KING
against
PHILIPPS.

[475]

1806.

The KING
against
PHILIPPS.

[476]

against the writer, in order thereupon to obtain surety of the peace against him;—I say, if such had been the intention of the writer, it would have been open to him to have shewn it in evidence on his part, and thereby to have repelled the bad intention either inferable from, and arising out of the act itself, or to have supplied extrinsic evidence (for so it must have been in support of the allegation of intent) if the act were sufficiently indifferent in itself to have rendered such proof necessary. Upon the whole, whether the letter in question be considered as an attempt to procure another to commit a misdemeanour, by provocation, intentionally addressed to that immediate purpose, or as a provocation to a challenge with the intention alleged in the prefatory part of the indictment (and it seems capable of being considered either way) it is in either of these points of view a competent subject of criminal prosecution, so as to sustain the indictment founded thereupon. The rule, therefore, for arresting the judgment in this case must be discharged. Rule discharged (a.)

(a) Vide Hicks's case, Hob. 215, where a libellous letter sent to the party himself was deemed a misdemeanour, because it was a provocation to a challenge and breach of the peace. So by 1 Hawk. ch. 6. s. 3. "It is a very high offence to challenge another, &c. or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters full of reflections, and insinuating a desire to fight," &c. But in William King's case, 4 Inst. 181, mere words of provocation, as liar and knave, though said to be motives and mediate provocation for breach of the peace, were yet considered as not tending immediately to the breach of the peace, like a challenge to fight, or a threatening to beat another, &c.

Monday,
May 27th.]

ATTREE against SCOTT.

Devises of a copyhold holding as tenants in common, have several estates to which they must be severally admitted, and for which several services are due to the lord

and several heriots on the death of each tenant: and the multiplication of heriots and fees on admission still continues, notwithstanding the re-union of the same land afterwards in one person, the estates or interests in the land, once divided in severalty, continuing several.

THE Plaintiff, steward of the manors of *Brighthelmstone* and *Atlinworth*, in *Sussex*, brought his action against the Defendant for bills of fees, &c. amounting to 80*l.* 15*s.* 4*d.* for business done at the two manor Courts. The defendant paid 64*l.* 11*s.* 2*d.* into Court; and at the trial at the last summer assizes at *Lewes*, a verdict was taken for the plaintiff for 16*l.* 14*s.* 2*d.* subject to the opinion of this Court, on the following case:—

The

1805.

ATTREE
against
SCUTT.

The plaintiff on the 5th of *December* 1799, was and still is steward of the said manors of *B.* and *A.* which lie adjoining to and intermixed with each other. By the custom of each manor, every copyholder upon death or surrender is liable to an heriot for every separate or distinct tenement holden of such manor; and it has been the constant usage for the steward to demand and receive a separate fee or set of fees upon the surrender of or admission to each separate tenement so liable to a separate heriot. *R. Tidy* being seised in fee of five separate copyhold tenements holden of the manor of *Brightelmstone*, and of five other separate copyhold tenements holden of the manor of *Atlingworth*, and having surrendered his copyholds in both manors to the use of his will, by his will, dated 26th of *Dec.* 1788, devised all the rest and residue of his real estate (which comprized the copyholds in question) to *R. L. Wichelo* and *T. Scutt*, and their heirs, as tenants in common; and died without revoking such will. On the 7th of *July* 1789, at Courts holden for each manor, *Wichelo* was admitted under the will to one undivided moiety of the five tenements respectively holden of the said manors; and at the same Courts *T. Scutt* was admitted to the other moiety thereof respectively. *Wichelo* and *T. Scutt* afterwards agreed to make partition of the estates so devised to them pursuant to the award of *H.* and *B.* who made their award describing the specific pieces to be allotted to each party; but before the same could be carried into execution *T. Scutt* died, having previously surrendered his copyholds in both manors to the use of his will; and by his will, dated 26th of *Oct.* 1794, he devised the same to his son, *B. Scutt*, the defendant, in fee. At Courts holden for each manor on the 25th of *June* 1796, the defendant was admitted under his father's will to an undivided moiety of the five tenements respectively holden of each manor. And at Courts respectively holden for each manor on the 5th of *December* 1799, before the plaintiff as steward, *Wichelo*, for the purpose of carrying the partition into execution, surrendered all his undivided moiety of and in such of the specific pieces of land as by the award were allotted to *T. Scutt* (describing them specifically by their boundaries and abutments, and also describing of which of the specific tenements

[477]

[478]

1806.

ATTORNEY
against
SCUTT.

tenements formerly holden by the said *R. Tidy* they formed a part) to the use of the defendant and his heirs, and the defendant surrendered his undivided moiety of and in the specific pieces allotted to *Wichelo* in like manner to him and his heirs; upon each of which surrenders and admissions five sets of fees were claimed in each manor of the defendant, and five of *R. L. Wichelo*; which fees were admitted to be due and form a part of the sum paid into Court. Afterwards, at the same Courts respectively, the defendant surrendered part of the lands so allotted to him (describing each piece by its abutments and boundaries,) and further describing some of the pieces so surrendered as being together part or parcel of one of the tenements lately *Tidy's*, and others of them as being together part or parcel of a second tenement late also *Tidy's*; others again of a third, others of a fourth, and others of a fifth; and annexing the descriptions of each tenement as given in the former Court-rolls, to the use of *John Wichelo* and his heirs; who was accordingly admitted. Upon these last surrenders the steward claims ten distinct sets of fees in each manor, as and for ten distinct and separate tenements; viz. five sets of fees for the moiety of five tenements which was vested in the defendant under his father's will; and five sets of fees for the other moiety thereof, which he took under the surrender of *R. L. Wichelo*. The question for the opinion of the Court was, Whether these were to be taken as ten distinct tenements in each manor, so as to entitle the plaintiff to ten sets of fees, or as five tenements in each manor only? If they were to be taken as five only in each manor, then the verdict would be entered for the defendant, the sum paid into Court being sufficient to cover what was due; but if they were to be taken as ten tenements in each manor, then the verdict was to be entered for the plaintiff, damages 16*l.* 4*s.* 2*d.*; but the quantum of the damages to be subject to the award of *Thomas Partington* and *George Courthope* the Younger, Esqrs. It was further agreed that the will of *R. Tidy*, the several admissions and surrenders stated in the case, and the award of *H. and B.* together with a deed of partition made in pursuance thereof, and any part of the Court rolls of the said manors which the counsel for either party might require

[479]

quire, or which the Court might think necessary, should be read as part of the case.

Watkins, for the plaintiff, contended, that by the devise of the five several tenements in moieties to *R. L. Wichelo* and *T. Scutt*, as tenants in common, to which they were respectively admitted, the ten moieties became so many distinct tenements by operation of law, and being once holden as distinct tenements by different tenants, the respective moieties did not re-unite again when holden afterwards by the same tenant. Tenants in common, by the very nature of their estate, have several tenements, to which they must be severally admitted, and which must be severally surrendered upon conveyance to a purchaser. Before the surrender of the parcels of *Wichelo's* moieties, the defendant held five distinct tenements which he had from his father, and after those surrenders he held so many more distinct tenements which he had not before; for one tenant cannot hold another's tenement. Now, as it is a rule in regard to copyholds, that the lord's act shall not prejudice the copyholder's estate, or determine his interest, (a) so neither can the tenant's act prejudice the lord; (b) and so tender is the law of affecting the interest of the lord, that general words of a statute shall not extend to copyholds if his interest would be thereby prejudiced, as by an alteration of the tenure; (c) though where no prejudice can thereby ensue to the lord, the general words of a statute will comprehend copyholds. (d) Now here, if those which were at one time two distinct tenements, while holden by different tenants, unite again as one when holden by the same tenant, great prejudice would ensue to the lord, and his steward, and also to the revenue. [Lord *Ellenborough*. The interests of the steward and of the revenue are merely consequential to that of the lord, to which alone we can look in this case. The only question is, Whether there be a legal re-union of the different parts of that which was formerly one tenement?] The two moieties of a tenement which had before been divided, might descend to the same

1805.

ATTREE
against
SCUTT.

[480]

(a) *Lane's case*, 2 Rep. 17, and *Waldoe v. Bartlett*, Cro. Jac. 573.

(b) 4 Rep. 25, *b. Kite and Quinton's case*.

(c) *Heydon's case*, 3 Rep. 8.

(d) *Glover v. Cope*, Carth. 205, and *Doe v. Routledge*, Cowp. 710.

person;

1805.

ATTREB
against
SCUTT.

[481]

person; the one from the paternal, and the other from the maternal ancestor; in which case, if they were to vest as one tenement, the future descent would be altered, and the maternal heir would be disinherited, contrary to the established rule of descent. Nor is it any objection that the same person should be tenant in common with himself where he holds the respective shares in different rights: as if one of three joint tenants release his part to another of his companions, the releasee shall hold that part with himself and his companions in common, though the two still continue to hold their original parts in jointure. *Lit. s. 304 and 312.* And Lord Coke, in his *Comment. on Lit. s. 297*, says, "If lands be given to John Bishop of Norwich, and his successors, and to John Overall, D. D. and his heirs, being one and the same person, he is tenant in common with himself." 36 H. 6. pl. 3. fo. 7. And finally he referred to Bruerton's case, (a) Talbot's case; (b) and Fitz. Abr. Heriot, 1, to shew that entire indivisible services, whether annual or otherwise, shall be multiplied by the conveyance of any part of the estate to another; although the several parcels might afterwards come to the same person; which rule, he contended, must govern the present case.

Best, Serjt. *contrâ*, said, that the Court would require a direct authority in point before they would aid by their judgment a demand which went to the destruction of copyhold estates, by burthening them without limit with multiplied fees and heriots upon every subdivision amongst tenants in common, which in the common course of inheritance would from time to time occur, till at length the estate would not be worth the expence of the fees and heriots on the transmission of it. But admitting that so many different heriots would be due upon the deaths of the several tenants in common in respect of their several undivided shares of the same estate, the reason of which is, that otherwise the lord would be deprived entirely of his heriot, as there might always be some of the tenants living, it does not follow that distinct fees would be due, as upon admission of the same person to so many distinct estates before held in common; for though the law will

(a) 6 Rep. 1.

(b) 8 Rep. 104, b.

keep the interests of tenants in common separate, where it is necessary for the purposes of justice, as where there are two sets of heirs, one claiming by descent *ex parte * paterna*, and another *ex parte materna*; in which case the steward, having the increased trouble of separate admissions, is entitled to as many different fees for each; yet altogether the tenancies in common make but one estate, and must be considered as such when re-united in one person, and where one admission will suffice. In the case of the Bishop of *Norwich* it might be necessary to have separate admissions; because the two moieties which centered in him were holden in different capacities, one in his natural, and the other in his political capacity; but *Cessante ratione cessat et ipsa lex*, is a maxim applicable to this case: and the authority of Lord Coke is express against the plaintiff's claim, who says in his *Treatise on copyholds*, (a) "If two joint-tenants, two tenants in common, or tenant for life, and he in remainder join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only."

Watkins in reply, observed, That *Kitchen* (b) in his *Treatise of Courts*, cites the last-mentioned passage from Coke's *Copyholder*,—and observes, That Lord Coke cites no authority for the position there laid down; and the reference in the margin of the book to 4 Rep. 27, b, certainly does not support it (c) in respect to tenants in common, who have several estates; and, therefore, differ from joint-tenants, and from tenant for life and remainder-man, who have only one estate.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J. The question in this case, [463] as stated by the plaintiff's counsel, simply amounts to this, Whether if two persons hold a copyhold as tenants in common, and the one surrender his moiety to the other, and the other be admitted, he shall hold the land in respect of the lord and the steward, for the purpose of fines and fees on admittance, as one tenement for as two? It has been settled so long ago as the time of Ed. III. That if any tenant who

(a) Co. Cop. s. 56.

(b) Fo. 123, a.

(c) The passages in 4 Rep. 27, a, and 28, a, are in substance opposed to the passage in the *Copyholder*, so far as respects Tenants in Common.

holds

1805.

ATTREE
against
SCUTT.
* [482]

1805.

ATTREE
against
SCUTT.

[484]

holds of me by a heriot alien parcel of the land to another, each of them is chargeable to me with a heriot: for it is entire: and if the tenant purchase the land again, yet if I were seised of the heriot by another man, I shall have of him, the tenant, *for each portion* a heriot. This doctrine is to be found in *Fitz Ab. tit. Heriot, pl. 1*; and from thence it follows, That if an estate holden by indivisible services be divided and holden in severalty, and afterwards by the act of the parties shall come again into one hand, the services which were multiplied shall continue to be payable, not as for one tenement, but for *each portion* respectively, *i. e.* as for distinct tenements; and that they do not again become in respect of the lord one tenement. The defendant's counsel did not in his argument insist that this might not be so, where parcel of a tenement had been aliened and holden *in severalty*; but insisted that this case differed, as it is the case of an *entire tenement*, having been for some time holden by several persons *in common*, and not in severalty, and afterwards coming into one hand by a conveyance to one of such tenants of the interests of the rest; contending that a conveyance by a number of tenants in common is not the conveyance of distinct estates but of one estate; but to this we do not assent. Tenants in common are they who have lands by several titles, each having a several freehold, but with an undivided occupation; and every one of them shall do several services and several suits; and one of them may enfeoff the other, for there is no privity between them. *Brook's Abr. tit. Feoffment de Terres, pl. 45*; and in consequence of there being no privity, the one cannot release to the other: and in the case of *Fisher and Wigg, 1 Ld. Raym. 622*, and *1 P. Wms. 14*, one of the arguments used by Lord *Holt* against construing a surrender of a copyhold to *A. B. and C.* equally to be divided among them, as creating a tenancy in common, was according to the report in *P. Wms. 21*, "That by such construction, instead of one copyhold estate, and one fine, and single service, there would be five several copyhold estates, and as many fines and services:" and as to the authority from Lord *Coke's Copyholder*, sect. 56, where it is laid down, "That if two joint-tenants, *two tenants in common*, or tenant for life, and he in remainder join in the grant of a copyhold, one fine

fine is due, and that it shall enure as *one grant only*," we think there must be some mistake in the printing, the page referred to in 4 *Co.* 27. *b.* being silent as to any such subject; and though the law is certainly as there laid down as to joint-tenants and tenant for life and remainder-man, yet it may be well doubted as to tenants in common who have several estates; and in *Plowd.* 140, it is laid down, That if two tenants in common grant a rent of 20*s.* out of their land, it shall enure as several grants; and in *Perkins*, sect. 107, it is laid down, that if two tenants in common of a carue of land lease the same, it shall take effect as several leases. These reasons and authorities shew that a conveyance by several tenants in common is a conveyance of distinct estates by each; and it being certain, that where divers persons have had several freeholds in divided parts of the same estate, their coming into one hand will not reunite them, so as to prejudice the lord in respect of the services antecedently due to him; so it is to be seen whether there be any reason why the same rule of law should not hold in the case where divers persons have had *several* freeholds in *undivided* parts of the same entire subject. No authority has been quoted to shew that the law is different in the two cases, and the mode of the occupation or possession as between the tenants of the land, can have no effect on their relation to the lord, in respect of the services due from them to him. It was admitted, That if there be a sufficient reason for keeping separate the estates one man may have in himself, that it shall be so, and that on that account a man may be in two distinct capacities tenant in common with himself; as in the cases put in *Co. Lit.* 190, *a.* 13 *H.* 8, 14, &c. in margin; but, it is said, that *cessante ratione, cessat lex*. Is that maxim, however, applicable in this case? It has not been shewn, nor is it contended, that the estates, if re-united, would entitle the lord to multiplied services as for *one* tenement; but the authority from *Fitz. tit. Heriot*, shews that an heriot shall be paid for *each portion* as a *several* tenement; nor that an increased number of them shall be paid for *the whole* as *one entire* tenement: and if the lord be only entitled to several heriots as for several tenements, there is a reason, *ss.* the protection of his interest, that the tenant should be considered as tenant in com-

1805.

ATTORNEY
against
SCUTT.

[485]

1805.

ATTREE
against
SCUTT.

[486]

mon with himself in this respect, and in this qualified sense at least, of the different portions of his estate: and his situation will be little different from one who may have two entirely distinct copyhold estates, the parcels of which by long possession have become so blended as to make it unknown to which estate they respectively belong. As we are not able to find any case where a tenement, once divided into several by the act of the parties, has been again re-united to the prejudice of the lord in respect of the services rendered before such re-union, we think the tenements in question must be considered as distinct and several for the purpose of the present demand, which is consequential upon the right of the lord to several services, and the necessity of several admittances as to several tenements; and so thinking, notwithstanding the great expence which may in consequence attend the transfer of copyhold property, we are of opinion that, as the law now stands in this respect, there must be judgment for the plaintiff.

Postea to the plaintiff.

Monday,
May 27th.

DOE, on the Demise of GEORGE LEACH, against MICKLEM.

Words may be supplied in a will to render a sentence complete and intelligible in aid of the apparent intent to be collected

IN ejectment for an undivided moiety of an estate called *Holmers*, in the county of *Berks*, a verdict was found for the Plaintiff at the trial before *Lawrence, J.* at the last assizes for that county, subject to the opinion of the Court, on the following case:—

from the whole context. As where a testator having two sisters *H.* and *J.* and also two infant cousins *T.* and *G.* the maintenance and education of which latter he recommended to his executrix and residuary legatee, devised his estate at *A.* to his sister *H.* for life, remainder to his sister *J.* for life, remainder to *T.* in tail, remainder to *G.* in tail, &c. remainder to his own right heirs: and then devised another estate at *B.* “to his sister *J.* for life, or if she should survive his sister *H.* so that she should come into possession of the estate at *A.*” then to *L. J.* (whom he made executrix and residuary legatee) for life, towards the support, &c. of his cousins *T.* and *G.* remainder to the said *G.* in fee; held, that as the word *or* so placed was unintelligible, being referable to no other alternative to give it effect; and as it was apparent from the whole context that the testator had in contemplation another alternative, namely, the death of his sister *J.* and that he meant to make a provision after the death of his sisters for his cousin *G.* as well as his cousin *T.* which was not satisfied by only giving *G.* a remainder in tail after a remainder in tail to his brother *T.*: in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the will should be read as if he had devised his estate at *B.* to “his sister *J.* for life, and after her death, or if she should survive his sister *H.* to that, &c.; then, &c.” and consequently *G.* took a vested remainder in the estate at *B.* to which he became entitled in possession after the death of the testator's sisters and *L. J.* his executrix, although his sister *J.* did not survive his sister *H.*

The

The lessor of the plaintiff claimed as devisee in remainder under the will of *James King*; and the question arises upon the construction of that will. (A copy of which was annexed to the case.) *James King* being seised in fee, as well of the premises in question, as also of an estate in his occupation in *Upton Gray*, *Weston Patrick*, and *Southwarnborough*, mentioned in his will as hereinafter set forth, and of certain other estates, and leaving a wife, who is spoken of in his will as a lunatic, made his will, dated the 4th of *January*, 1766. duly executed and attested; which, after stating that the deviser was desirous of settling his worldly estate, so that no controversy might arise about the same after his death, contains (*inter alia*) the following clauses, viz. "And as to the estate I occupy in *Upton Gray*, *Weston Patrick*, and *Southwarnborough*, I hereby give, devise, and bequeath to my sister *Anne Heath*, for her life, she paying 50*l.* a year to the above-named *Boyce Tree* and *George Green* (trustees for his wife before-named in the will) for the use of my wife for her life as is above directed, half-yearly. The first 25*l.* to be paid the first *Lady-day* or *Michaelmas*, which shall happen after my death; and likewise to my sister, *Mary Imber*, 20*l.* a year, to be paid her in the same manner by my said sister *Heath*; and if my said two sisters shall survive and outlive my wife, then I hereby order my said sister *Heath* to pay my sister *Imber* 50*l.* a year, in the same manner as I have ordered the 20*l.* a year during my wife's life; and in case my sister *Imber* shall survive my sister *Heath*, then I hereby give the rents and profits of my said estate to my sister *Imber* for her life; and after her decease, I hereby give the same to my cousin *John King* for his life; and after his decease, I hereby give the same to my cousin *Thomas Leach* and the heirs of his body; and for want of such issue, I hereby give the same to his brother *George Leach*, and the heirs of his body; and for want of such issue, I hereby give my said estate to my cousin *James Leach*, and the heirs of his body; and for want of such issue, to my right heirs for ever, always remembering, that every possessor of the above in *Upton Gray* shall pay out of it 50*l.* a year, as above directed, for the use of my wife during her life: and as to the freehold lands and premises in the parishes of *Bray* and

1805

DOE dem.
LEACH
against
MICKLEN.

[488]

1805.
 —
 DOE dem.
 LEACH
 against
 MICKLEM.

[489]

and *Clewer*, in the county of *Berks* called *Holmers*, which came to me on the death of my uncle *Winch* and his family, I hereby give and bequeath to my sister *Imber* for her life ; or, if she should survive and outlive my wife, and sister *Heath*, so that she shall come into the possession of my estate at *Upton Gray*, then I hereby give and devise the said estate in *Bray* and *Clewer*, called *Holmers*, to my dear good friend Mrs. *Mary Martha Lena Imber*, widow of my late nephew Capt. *Imber*, for her life, towards the support, education, and maintenance of my above-named cousins *Thomas* and *George Leach* ; and, after her decease, I hereby give the same to the said *George Leach*, and his heirs for ever." The testator also appointed the said *M. M. Lena Imber* sole executrix of his will, and residuary legatee of his personal estate. (a) The lessor of the plaintiff is the *George Leach* mentioned in the will. The testator died soon after the date of his will, leaving his wife, his sister *Imber*, his sister *Heath*, his friend Mrs. *M. M. Lena Imber*, and his said cousins *Thomas* and *George Leach* him surviving. The testator's sister *Imber* died before his sister *Heath* ; and both his said sisters died before the testator's widow. The widow died before the said *M. M. Lena Imber*, who is also dead. The question for the opinion of the Court was, Whether the limitation to the lessor of the plaintiff took effect ? If it did, the verdict was to stand ; if not, a nonsuit was to be entered.

This case was argued at great length by *Abbott* for the lessor of the plaintiff, and *Giffin Wilson* for the defendant, and a variety of cases cited in the course of the argument ; which turned principally on the question, Whether the words, " or if she (the testator's sister *Imber*) should survive and outlive my wife and sister *Heath*, so that," &c. made a condition precedent to the vesting of the remainder in the estate of *Holmers* in Mrs. *Mary Martha Lena Imber* for life, and of the subsequent remainder to *George Leach*, the lessor ?—in which case, the testator's sister *Imber*, having

(a) It appeared by the will which was annexed to the case, that after the bequest of the residue of his personal estate to Mrs. *M. M. Lena Imber*, that there follows this clause : " desiring her to contribute what she shall think necessary towards the support, maintenance, and education of the abovenamed *Thomas* and *George Leach*, so far as her circumstances and inclinations will permit, and she shall think they deserve."

died before his sister *Heath* and his widow, the event did not happen on which those remainders depended, and the defendant was entitled to judgment; or, Whether the words were only used to limit *one* event, in which the remainders over were to take effect?—the *other* event, which was to be collected from the whole context and apparent intention of the testator, being *the death of his sister Imber*?—in which case, the will would be read substantially thus: That the estates would be vested in his sister *Imber* for life, or until she should come into the possession of *Upton Gray*, with a remainder vested in interest to *M. M. Lena Imber* for life, to take effect in possession, either *upon the death of his sister Imber*, or, upon the event of his sister *Imber* coming into the possession of *Upton Gray*, and then the remainder over to *George Leach*, the lessor, would also be vested; and he was entitled to recover.

1805.
—
DOE dem.
LEACH
against
MICKLEM.

[490]

LORD ELLENBOROUGH, C. J. now delivered judgment. It appears from this will, that the testator had several persons standing in different degrees of relation to him, who were all of them objects of his bounty; and among them two sisters, for whom he made provision for their lives, out of his estate at *Upton Gray*, and that now in question, called *Holmers*; and also two cousins, *Thomas Leach* and *George Leach*; for whom, on the deaths of his sisters, he intended to make some provision out of these estates: and although, during the joint lives of his sisters, he made no express provision for their benefit, he was nevertheless not wholly inattentive to them; for he desires *Lena Imber*, his executrix and residuary legatee, to contribute, as far as her circumstances would admit and they should deserve, what should be necessary for their maintenance and education; shewing, in this clause, as well as that which contains the devise of *Holmers* to *Lena Imber*, an equal attention to his two cousins. Having thus attended to their interests during the life of *Lena Imber*, in whose care they seem to have been, he makes further provision for them after the deaths of his sisters; when, as his sisters would no longer want support, he was able more effectually to benefit his cousins: and, with that view, after giving a life-interest in the estate at *Upton Gray* to another cousin, *James King*, he gives that estate to *Thomas Leach* in tail general, with remainder to

1805.

—
DOE dem.
LEACH
against
MICKLEM.
[491]

George Leach in tail general, with a remainder to *James Leach* in tail general, limiting the ultimate remainder to his own right heirs. In this way, on the death of his sisters, he made a certain provision for *Thomas Leach*; but to *George Leach*, if the construction contended for by the defendant's counsel be right, he gave nothing; that is to say, Supposing the devise to *Lena Imber* (the sole object of which was to educate and maintain him and his brother) should not take effect; but a remainder in tail after an estate tail, which remainder might be defeated by his brother: but it would be strange to suppose that the testator, who had in view some provision for *George*, meant, that that which might be his only provision should depend on the circumstance of the estate for life in *Lena Imber*, in trust for him and his brother, taking effect; and that his intention was, That his cousin *George* should have no benefit from the devise to him of *Holmers*, unless he had also some antecedent benefit in common with his brother; and that he should have *nothing*, because he could not have *all*. The not happening of the event upon which the estate to *Lena Imber* was limited, could not continue or preserve any objects of the deviser's bounty to which it may be supposed he had a preference; and the happening of the event had not the effect of depriving *George Leach* of any benefit, so as to furnish any rational ground to suppose that the testator meant that the devise to him should depend on his sister *Imber's* surviving his wife and sister *Heath*. If *George Leach* would have lost any estate on such contingency, one might very well account for *Holmers* not being intended for him, unless such contingency happened; but in this case no circumstances exist to make such intention rational or probable. It may, perhaps, not be improper to add, as an auxiliary argument, that in the introduction to the will the testator professes his object to be the settlement of his worldly estate; words which prove him to have had his whole estate in his view at that time; and that he contemplated what he intended should go to his heir: the ultimate limitation of the *Upton Gray* estate, in failure of the issue of *James Leach*, being to his own right heirs: but no such provision is made in regard to *Holmers*; from whence it may be inferred, that an intestacy was not in his contemplation

[492]

as to any part; and that he did not, in any event, intend his heir to take *Holmers*. When the terms of the will are attended to, they will be found to be, as they at present stand, inaccurate and imperfect. The devise is in these words: "As to the freehold lands and premises in the parishes of *Bray* and *Clewer*, in the county of *Berks*, called *Holmers*, I hereby give and bequeath the same to my sister *Imber* for her life; or, if she should survive and outlive my wife and sister *Heath*, so that she shall come into the possession of the estate at *Upton Gray*, then I give and devise the said estate in *Bray* and *Clewer*, called *Holmers*, to my dear good friend Mrs. *Mary Martha Lena Imber*," &c. Now the word or, as here placed, has no intelligible meaning; it is a disjunctive particle, and ought to be referable to two or more alternatives to give it any effect. To make the sentence intelligible, the word or must either be wholly struck out, and some other word substituted in its room (which has been done in the cases alluded to by the plaintiff's counsel), (a) or those words supplied which appear to be omitted. If the word or is allowed to have been used by the testator in its proper sense, it indicates clearly that he had some alternative in his contemplation, and which he has omitted to state. This omitted alternative, from the context, evidently appears to be the death of his sister *Imber*; for the estate is given to her for life; and in no events, except those of her death, or succeeding to *Upton Gray*, was her interest in it to cease. If therefore the words necessary for this purpose are supplied, the devise will run thus: "As to the freehold lands in *Bray* and *Clewer*, called *Holmers*, I give and bequeath them to my sister *Imber* for life; and after her death, or if she shall outlive my wife and sister *Heath*, so that she shall come into the possession of my estate at *Upton Gray*, then I hereby give the said estate called *Holmers*, to Mrs. *Lena Imber*, towards the education," &c.; and after her decease, I give the same to *George Leach*, his heirs and assigns for ever. This way of reading the will makes it intelligible and rational throughout; agrees with what, upon the whole, must, we think, have been the intent of the testator; and supplies a necessary, and what, in our opinion, is the only alternative. I will mention two or three authorities,

1805.

—
Doe dem.
LEACH
against
MICKLEM.

[493]

(a) These were the well-known cases where or has been construed and.—
Moor, 422, 1 Wils. 140, &c.

1805.
 —
 DOE dem.
 LEACH
 against
 MICKLEM.

which appear to warrant the introduction of such words. In *Doe ex dem. Lee Compere v. Hicks*, 7 Term Rep. 437, a limitation to trustees and their heirs, in trust to preserve contingent remainders, was read as if the words "during the lives of the several tenants for life," had been inserted. So in *Spelding v. Spelding*, Cro. Car. 184, where a man having three sons, *John*, *Thomas*, and *William*, devised lands "to *John*, his eldest son, and the heirs of his body, after the death of *Alice*, the devisor's wife; and that if *John* died, living *Alice*, that *William* should be his heir:" and the Court there from the apparent general intent supplied after "if *John* died," the words *without issue*, so as to limit the remainder to *William*, on *John*'s dying *without issue*, living *Alice*. So in the case of *Fonereau v. Fonereau*, 3 Atk. 315, where a testator left the interest of 54,000*l.* to be paid to his children, share and share alike; and after their deceases, the principal equally among their issue; and in case all the issue of any one child should die before 21, the share of such child to be divided among the surviving children of the testator.

[494]

Lord *Hardwicke* (as there could be no reason for a devise over in the case of the issue of a child dying, and not in the case of a child itself dying without issue) held that the share of a child dying without issue should go over; supplying words, giving over the share of a child who had no issue. These cases are stronger than the present; for in them the structure of the sentence was perfect without any alteration or addition of words; in this case it is not. For these reasons we are of opinion that there should be judgment for the plaintiff.

Postea to the plaintiff.

1805.

GOODTITLE, on the Demise of DANIEL, against MILES.

Monday,
May 27th.

IN ejectment for a messuage and lands in the parish of *Ledbury*, in the county of *Hereford*, tried at *Hereford* Summer Assizes, 1804, a verdict was found for the Plaintiff for three-fourths of the premises, subject to the opinion of the Court, on the following case :

* By indentures of lease and release, dated the 1st and 2d of *April*, 1709, made previously, and in order to the marriage of *John Morton* the Younger, of *Callow Hill*, with *Joanna Charlett*; the premises in question, which had been purchased by and then belonging to the father of the said *John Morton*, with other lands, part freehold and part copyhold, were limited to the father of the said *John Morton* until the marriage, and after the marriage to the use of him the said *J. Morton* for life, remainder to the use of *J. Charlett* for life for her jointure, and after the decease of the survivor of *J. M.* and *J. C.* then to the use of the heirs of the body of the said *J. C.* by the said *J. M.* lawfully to be begotten, and for want or in default of such issue, then to the use of the right heirs and assigns of the said *J. M.* for ever. The said *J. M.* was the eldest son of his father. By the same indenture of release, a messuage and lands therein particularly described, situate in the several parishes of *Pixley* and *Aylton*, in the said county of *Hereford* (of which a coppice called *Shortcroft*, and the soil thereof, in the parish of *Aylton*, constituted part) were conveyed to the following uses, viz. as to the whole (except the said coppice) to the same uses as the premises in question are above mentioned to be conveyed and settled: and as to the said coppice, the

A. being possessed of lands at L. which had been settled on his marriage on himself for life, remainder to his wife for life for her jointure, remainder to the heirs of their bodies, with reversion in fee to himself; and having other lands at P. and Q. settled to the same uses (except a coppice, part of Q. of which coppice as well as of some other lands he was seised in fee) after the death of his wife, & having only two daughters living, devised to his daughter J. in tail his unsettled estates by name, and all other his freehold, copyhold, & leasehold lands, which he was possessed of or entitled to, and which were not settled

in jointure on his late wife (except the coppice, which he directed should always be held with his estate at P.) she, his said daughter, and the heirs of her body, paying out of all the aforesaid lands a certain annuity unto his other daughter A. M. for life: and in case his said daughter J. should die and leave no issue, then to his other daughter A. M. for life, remainder to her children; charged, &c. remainder, to his nephew in fee. Held, that the reversion of the settled lands did not pass by the will, but were excepted out of the general clause by force of the restrictive words, "and which are not settled in jointure," &c. not only by the natural import of those words, but because of the incongruity of imputing to the deviser an intention of devising estates tail and for life to his daughters in lands which were before settled on them in tail general; though it did not appear that the testator had any other real estate on which the general clause could operate, except the reversion of his settled lands.

1805.

GOODTITLE
ex dem.
DANIEL
against
MILES:

[496]

same expectant on the marriage was limited unto and to the use of the said *J. M.* his heirs and assigns for ever. The marriage took effect, and the said *Joanna* died in Nov. 1738, leaving by her husband the said *J. M.* who survived her, four daughters, and no son, viz. *Judith*, *Joanna*, *Anna Margaretta*, and *Rebecca*. *Judith*, the eldest of the said daughters, intermarried with *W. Skynner* in the year 1740; and by the settlement made on this marriage, in which the said *J. M.* her father joined, the reversion in fee of him the said *J. M.* of *M.* of and in the undivided fourth part or share of which the said *Judith* was seised as tenant in tail in remainder of and in (*inter alia*) the premises in question; (subject to certain precedent estates now expired) was conveyed to the use of the said *W. Skynner*, his heirs, &c. After making the said settlement, *Joanna* and *Rebecca Morton*, two of the said four daughters, died without issue in the lifetime of their father; and *Anna Margaretta* intermarried with one *H. Jones*. *J. Morton* being seised of the reversion in fee of and in three undivided fourth parts of the same premises, expectant on the determination of the estate tail in remainder, then vested in his said two surviving daughters, and being also seised of the following hereditaments, viz. the said coppice in the parish of *Aylton*, and a cottage and lands called *Brockington*, in the parish of *Munsley*; a messuage, farm, and lands called *Kewsope*, in the parish of *Arenbury*, in the county of *Hereford*, and of and in the moiety of a messuage and garden called *Tower Hill*, in *Bromyard* in the same county; he (*J. Morton*) duly made and executed his last will in writing, dated 12th of January, 1750, whereby, after giving his daughter *Anna Margaretta Jones* 10*l.* to buy her mourning, 20*s.* to the poor of the parish of *Munsley* aforesaid, 10*s.* each to the poor of the parishes of *Aylton* and *Pixley*, and other sums to the poor of other parishes, the will proceeded as follows: “*Item*, I give and devise to my daughter *Judith Skynner*, and to her heirs and assigns for ever, all that my cottage, with the lands, &c. called *Brockington*, in the parish of *Munsley*, upon trust, that she and they shall yearly for ever buy four garments, &c. of the value of about 10*s.* or 12*s.* and give the same to the most deserving poor persons of

Munsley

Munsley yearly. And I further give and devise unto my said daughter *Judith Skynner*, and to the * heirs of her body lawfully begotten or to be begotten, all that my messuage, lands, &c. called *Kewsop*, in the parish of *Avenbury*, charged and chargeable with the payment of 20s. a-year to the poor of *Avenbury* and *Munsley* for ever: and also all that moiety or half part, undivided, of a messuage and garden called *Tower-Hill*, in *Bromyard*, in the county of *Hereford*; and all other my freehold, copyhold, and leasehold lands and houses, &c. whatsoever and wheresoever, which I shall be possessed of or anywise entitled unto at the time of my decease, and WHICH ARE NOT SETTLED IN JOINTURE ON MY LATE DEAR WIFE, except the coppice at *Aylton*, which I will and direct shall always go and be held with my estate at *Pixley*, in the same manner as that estate is settled; she, my daughter *Judith*, and the heirs of her body, paying out of all the aforesaid lands unto my sister, her said daughter *Anna Margaretta Jones*, the clear sum of 15*l.* yearly during her natural life (the same to be paid to her own separate use;) and in case my said daughter *Judith* shall happen to die and leave no issue of her body, then I give and devise all and singular the aforesaid premises with their appurtenances to my said daughter *Jones* for life; and after her decease then to the child and children of my daughter *A. M. Jones* as shall be then living, charged and chargeable as aforesaid. And for want of such issue, then I give and devise the premises to my nephew Mr. *Francis Morton*, and to his heirs, &c. charged and chargeable as aforesaid; and also paying there-out to his brother Mr. *John Morton* the sum of 5*l.* And I give and bequeath all the arrears of rent which shall happen to be due to me from my tenant at *Callow Hill* at my death to my said two daughters: and I further give and bequeath unto my said daughter *Judith Skynner*, her heirs and assigns, all mortgages made to me in fee or for term of years, and all and singular other the rest and residue of my goods, chattels, and personal estate of what nature or kind soever, which I shall be possessed of or entitled to at the time of my decease, after payment of my debts, legacies, and funeral expences." And he appointed his daughter *Judith Skynner* sole executrix of his will. The estate at *Pixley* and the coppice at *Aylton*, mentioned in the will, are the same as
are

1805.

GOONTITLE
ex dem.
DANIEL
against
MILES.

* [497]

[498]

1805.

GOODTITLE
ex dem.
DANIEL
against
MILES.

are mentioned in the settlement of 1709. The testator *John Morton* died 17th of *June*, 1751, without revoking or altering his will. *Judith*, his eldest daughter, survived her husband *Wm. Skynner*, and married the Rev. *Wm. C. Hopton*, and died in *Dec.* 1784, without ever having had issue. *Anna Margaretta*, the other daughter of *John Morton*, who survived her father, outlived her husband *H. Jones*, and afterwards married *H. Durbin*, and died in *October*, 1799, without ever having had issue. *Francis Morton*, the nephew and devisee in remainder in the will of *John Morton*, died in *August*, 1762, intestate, and without issue, leaving two brothers, the Rev. *J. Morton*, of *Redmarley*, and *W. Morton*, him surviving. *John Morton*, of *Redmarley*, the eldest brother, and heir at law of *Francis Morton*, died intestate, and without issue, in *March*, 1789, leaving *Wm. Morton*, his only brother and heir at law, him surviving. *Wm. Morton* devised to the lessor of the plaintiff, and died on the 2d day of *May*, 1784; and on the trial a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, upon this question, "Whether the reversion in fee in three undivided fourth parts of the premises in question, passed by the will of *John Morton* the settlor, or descended upon his death to his said two then surviving daughters *Judith* and *Anna Margaretta*?"

[499] The case was argued on a former day in the Term by *Dumcey* for the plaintiff, and *Abbott* for the defendant. The argument turning on the meaning of the words, "and not settled in jointure on my late wife," whether restrictive or not, and upon the apparent intention of the devisor to be collected from the whole of the will together, it is unnecessary to detail it, particularly as the cases most applicable to the subject were referred to by the Court in giving judgment. On this day

Lord ELLENBOROUGH, C. J. delivered judgment.

The question reserved for the opinion of the Court rests upon this consideration Whether sufficient appears in this will to shew that the intention of the testator was that the general words relied on by the lessor of the plaintiff should not extend to and comprehend the reversion of the estates settled upon his marriage? for if they be unrestrained, it cannot be contended that they are not sufficient to carry the

the reversion: and on the other hand, there cannot be any doubt but that they may be restrained, either by expressions directly controlling them, or by the clear intention of the testator, to be collected from the whole of the will. The words "not settled in jointure upon my late wife," are those relied on as having the effect of controlling the generality of the words made use of by the testator, and of excluding them from passing the reversion of the settled lands. And we think in this case they have that effect, upon comparing the provisions and limitations of the will with those of the settlement made on the testator's marriage, and considering the state of his family when the will was made. The lands in question were, on the marriage of the devisor, settled on himself for life, with remainder to his wife for life for her jointure, with remainder to the heirs of the body of the wife by the devisor begotten, remainder to his own right heirs. At the time of making the will the wife was dead, and he had only two daughters living, who, under the settlement, had in these lands a vested remainder in tail general, expectant on the determination of a life estate in the devisor. Under these circumstances the devisor had no interest which could be the object of any disposition to be made by him, but subject to the remainder in tail general in his daughters; nor had he any thing upon which his will could operate in the limitation of any estate in possession until both the daughters should be dead without issue: and therefore if the testator's object was, as according to the provisions of the will it must have been, to limit estates, which were to take effect during his daughters' lives, it is impossible to suppose the testator could mean that his will should extend to lands, in respect of which he must have known that it could not operate to create the estates intended. In the particular lands which he meant to be the subject of the devise, he intended to give his daughter *Judith* an estate tail; but such estate it was impossible to carve out of the reversion, as the lessor of the plaintiff contends; for so long as there was a possibility of her having heirs of her body, she must have had a prior estate of as high and of as durable a nature under the settlement itself; and when that possibility ceased, both she and all those who under this devise

1805.

GOODTITLE
ex dem.
DANIEL
against
MILES.

[500]

1805.
 GOODTITLE
 ex dem.
 DANIEL
 against
 MILES.

[501]

visé could claim any interest in the lands in question would be extinct, inasmuch as, according to the construction of the plaintiff, the devise to *Judith* would be of an estate in tail general expectant on the determination of an estate in tail general already subsisting in herself, and in the same lands, under the settlement, And the devise to *Anna Margaretta* would be of an estate for life, with a remainder possibly for life only, to such children as should be living at her death, to vest in possession in her and her children after the death of herself and all her children: and if the remainder be to them in tail, the same observation will apply which I have made as to the estate which it is contended was given to *Judith* in the land in question. That the testator recollected the settlement at the time of his will, appears clearly by his reference to it; and it is impossible to suppose that with that settlement presented to his mind he could have intended what it is insisted on by the lessor of the plaintiff that he did intend, and which would in effect amount to this, that without any object in view but to give the reversion in fee to his nephew, he should make previous limitations of the subject-matter which he knew could never take effect. His will shews that he was aware that the settlement was in force; and when he was by his will giving estates in tail, we cannot suppose him ignorant of the nature of those estates, so as to conclude that he meant to give them in lands, in which, from the previous existence of similar estates (a fact known to himself) they never could take place. Let, however, the lands in settlement be excluded from the operation of the clause, and the devise will be rational and consistent throughout. But it is said, that if this reversion shall not pass by the will, there is nothing upon which this general clause can operate, as the devisor has specifically devised all his other estates. As to which, it may be said in the first place, that it does not appear whether he had or had not other estates; if he had, the devise will operate upon them; if he had not, the clause will be more properly referable to an anxious care on the part of the drawer of the will to comprehend such estates, if any, as it might not have before occurred to the testator to include by express mention, but upon which the provisions

of

[502]

of the will were meant to attach, than to suppose the testator meant a thing so inconsistent and absurd as that the reversion of the settled land should be the subject of a devise framed as this is. If any thing could properly be inferred from the wording of the clause, as to whether he had any other estates or not, one would be led to suppose that he had both copyholds and leaseholds not specifically devised: if he had neither, it shews that the clause was meant cautiously to take in things to which the devise may reasonably be referred, and which were not before specifically enumerated or described in the will. One of the grounds taken by Lord *Mansfield* for restraining the general words of a will to a distinct class of lands, in the case of *Strong v. Teatt*, in 2 *Burr.* 912, was the absurdity that would follow from giving it its utmost latitude of construction. This argument appears to us so conclusive on the question, as to make it unnecessary to consider what weight is due to the other arguments on the part of the defendant. However, as to the argument drawn from the direction in the will, "that the coppice at *Aylton* should go and be held with the testator's estate at *Pixley*, in the same manner as that estate was settled," it may be observed, that the direction shews that any argument, depending on a supposed intent in the testator not to die intestate as to any part of his property, is not well founded; for the effect of the direction as to the coppice, is to make his daughters tenants in tail thereof, as they already were under the settlement of the estate at *Pixley*, to which it is thus annexed by the will; leaving the reversion of it to go to his right heirs. So that there would unquestionably be an intestacy as to the reversion of the coppice in virtue of its express exception out of the general clause, even according to the construction contended for by the plaintiff. As to the cases of *Cook v. Gerrard*, (a) *Willows v. Lydcott*, (b) *Strode v. Lady Russell*, (c) and *Chester v. Chester*, (d) relied on by the plaintiff, it is not necessary to go into them; for the general doctrine contained in them is not disputed, and our opinion goes on this: That supposing

1805.

GOODTITLE
ex dem.
DANIEL
against
MILES.

[503]

(a) 1 Lev. 212. 1 Saund. 181.

(b) 3 Mod. 229, and 2 Ventris, 285.

(c) 2 Vern. 621.

(d) Fitzg. 150. 3 Pr. Wms. 56.

1805.

GOODTITLE
ex dem.
DANIEL
against
MILES.

[504]

the words "not settled in jointure on my wife," to be insufficient of themselves to restrain the effect of the general words in the clause relied on by the plaintiff, yet taking with them at the same time into our consideration the limitations in the settlement, and in the will, they must we think be understood as being restrictive: and the question in this case is, as in most other cases on wills, a question of intention to be collected from the whole of the instrument as applied to the subject-matter. It may, however, be observed, that this case differs from all the cases cited, except that of *Glover v. Spendlove*, 4 Bro. Chan. Ca. 337. In all the other cases the words which were holden not to be restrictive, were properly descriptive of a reversionary interest, or an interest remaining in the deviser, which he had power to dispose of. In *Willows v. Lydcott*, the words were "not above disposed of;" in *Strode v. Lady Russell*, the words were "out of settlement;" in *Chester v. Chester*, "not by me formerly settled, or hereby by me otherwise disposed of;" and in *Cook v. Gerrard*, the words were "all my lands not settled or devised:" but in this case, the words "not settled in jointure on my late wife," are not properly descriptive of the reversion which the deviser had, for that was an interest to take effect in possession after a vested estate tail; and of the entire estate in the lands not settled in jointure on his late wife, the deviser had not a power of disposing; and therefore there seems ground for the argument that these words were meant to be descriptive of the lands, and not of the deviser's interest or estate. Had the testator used these words, "not settled on my marriage," or, "not settled in jointure on my wife and afterwards on her children," this case would have been more like to the cases above mentioned. And as to the case of *Glover v. Spendlove*, although in that case the words were the same as in this, yet it is to be observed that there, as the testator had no son, he had for all purposes of substantial benefit the fee expectant on his wife's life estate, she then being alive. But it is not necessary to say more as to the analogy between this and the other cases cited, as our opinion is not founded upon the bare effect of the words (which we consider as being restrictive or exclusive) independent of the other circumstances

circumstances which particularly belong to this case. For these reasons, we are of opinion that the *postea* should be delivered to the defendant.

1805.

GOODTITLE
ex dem.
DANIEL
against
MILES.

Postea to the defendant.

DOE, on the Demise of LEPPINGWELL, suing in *Forma Pauperis*, against TRUSSELL.

[505]

BOSANQUET, on a former day in this Term, obtained a rule to shew cause why the lessor of the Plaintiff should not be dispaupered, and why he should not pay costs for not proceeding to trial at the last Spring Assizes.

The lessor of the plaintiff, in ejectment, suing in *forma pauperis*, will be dispaupered in case of vexatious delay.

It appeared that notice of trial had been given for the Summer Assizes, 1804, and countermanded six days before the Assizes; that notice of trial was again given for the last Spring Assizes, and the cause entered for trial, but that on the third day of the Assizes the record was withdrawn; that the Defendant had incurred above 100*l.* costs in procuring evidence; and his attorney swore that he believed the merits to be in favour of the defendant. It further appeared that the lessor of the plaintiff, in another cause of *Doe d. Leppingwell v. Thompson*, which depended upon the same circumstances, having omitted to proceed to trial at the Summer Assizes, 1804, pursuant to notice, made an affidavit that he was prevented from trying the cause, for want of several copies of registers which he had been unable to procure in time; upon which the Court discharged a rule for judgment, as in case of a nonsuit, on his peremptory undertaking to try at the Spring Assizes; with which undertaking he had neglected to comply, and judgment, as in case of a nonsuit, had been obtained. To shew that the proper course was to move that the party should be dispaupered in case of vexatious delay. 2 *Salk.* 506; *Taylor v. Lowe*, 2 *Str.* 903; *Brittain v. Grenville*, 2 *Str.* 1122; and 2 *Tidd's Practice*, 893; were cited. (a) It was contended that the lessor of the plaintiff ought at least to have countermanded

[506]

(a) See also *Rice v. Brown*, 1 *Bos. and Puller*, 39.

1805. his notice, and thereby saved a great part of the expence which the defendant had sustained.

—
Doe
ex dem.
LEPPING-
WELL
against
TRUSSELL.

On this day *Lawes* shewed cause upon an affidavit, which stated, that the lessor of the plaintiff having about 30 copies of registers to procure, and several witnesses to collect, among whom was an old and infirm man, was unable to get to the assizes in time, and therefore was under the necessity of withdrawing the record.

The Court, however, made the rule absolute for dispaupering the lessor of the plaintiff, but discharged it as to the payment of costs.

END OF EASTER TERM.

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

Trinity Term,

In the Forty-fifth Year of the Reign of GEORGE III.

The Company of Proprietors of the LIVERPOOL Water-Works *Tuesday,*
June 18th.
against ATKINSON.

The Same *against HARPLEY.*

IN debt on bond, dated 1st of *January*, 1802, the Plaintiffs in their declaration set forth the condition of the bond; whereby, after reciting that the Defendant had agreed with the company to collect and receive the several rents and other revenues of their works at *Liverpool*, from time to time for 12 months, from the date thereof; and that the company having required security for the due performance of the said office of receiver, in the manner and to the effect after mentioned, *T. Harpley* had agreed to join with the defendant in the bond for that purpose, upon the condition thereunder written: the condition was thereby declared to be, that if the defendant "should from time to * time, and at all times thereafter, during the continuance of such his employment," use due diligence in collecting and receiving all rents and sums of money which should (a) grow and become due to the company, their successors or assigns at *Liverpool*, from and in respect of their said works; and should, as often as requested by the company, their suc-

The condition of a bond reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for 12 months;" and afterwards stipulating that, "at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed," he would justly account and obey orders, &c. confines the obligation to the period of 12 months mentioned in the recital.

(a) In the condition, as afterwards set forth, on oyer, in the defendant's plea, the word *annually* was here introduced.

1805.
 —
 LIVERPOOL
 Water-works
 Company
 against
 ATKINSON.

cessors, &c. well and truly pay and account for to the company at *Liverpool*, to their satisfaction, all such sums as he the defendant should have received from any person to the company's use, and render to the company, their successors, &c. *from time to time* a true account in writing of all sums by him theretofore received on account of the said works, for the rents and other revenues thereof, or on account of the company, &c. and for which he ought to be charged or chargeable, and should then also deliver up to the company all books of account, vouchers, &c. whatsoever belonging to the company then in his custody; and also if the defendant should, "so long as he should continue and be employed by the company from time to time, observe and perform the orders of their committee as far as the same should concern his said employment, and justly and truly in all other respects behave himself in the said office or employment of receiver of the aforesaid rents and other revenues, and duly account for the same as aforesaid, then the said writing obligatory was to be void, or else to be in full force." The plaintiffs then averred, that the defendant continued and was employed by the company in the said office or employment of receiver, in the condition mentioned, for a long time after the making of the said writing obligatory, viz. From the date thereof until and upon the 14th of *September*, 1804, and during that time received divers sums from divers persons (a) to the company's use, amounting in the whole to 400*l.*; and then assigned as a breach the not accounting for and the paying the same. There were other general counts in debt for so much received to the use of the company, and upon an account stated.

[509]

The defendant, after craving oyer of the bond and of the condition, which was set forth in the same words as stated in the declaration, with the addition of the word *annually* in the place before noted, pleaded, That for twelve months from the date of the obligation he did from time to time collect and account, &c. (in the words of the condition) and did pay to the company all sums received by him during the

(a) *Vide* note (4) to 2 *Saund.* 411.

said twelve months, to the use of the company, &c.; and so pleaded performance of the condition. 1805.

Replication. That the defendant, after making the writing-obligatory, and after the expiration of twelve months from the date thereof, and during the time that he continued and was employed in the said office or employment of receiver as in the condition mentioned, received the sums in the declaration mentioned, and broke the condition in manner and form as complained of. To this there was a general demurrer and joinder. There were similar pleadings in the other action against *Harpley* the surety.

LIVERPOOL
Water-works
Company
against
ATKINSON.

Richardson, in support of the demurrer, contended that the replication, which alleges a receipt of money not accounted for by the defendant after the expiration of 12 months from the date of the obligation, was no answer to the plea of performance of the condition to account for the 12 months, during which period alone, the obligation was in force; and that the subsequent words in the recital of the condition, requiring security for the performance of the office "in the manner or to the effect after mentioned," or the further words in the condition binding the defendant to account from time to time and at all times thereafter during the continuance of such his employment, must be taken with reference to the period of 12 months before named, for which he was appointed to collect the revenues of the company, and for which the surety was bound. And he cited *Lord Arlington v. Merricke*, (a) as in point; in the note (b) to which the principal cases on the subject are collected, viz. *Horton v. Day*, (c) *Wright v. Russell*, (d) and *Barker v. Parker*. (e) And he observed, that there would be no injustice in this construction, as the principal would still be liable in an action for money had and received for all sums received by him for the company. [510]

J. Clarke, contra. The condition of the bond is so plain to account for all sums received by the defendant "at all times during the continuance of his employment," that it is not necessary to call in aid the recital in order to explain those words; neither does the sense of the con-

(a) 2 Saund. 411.

(c) *Ib.* Sty. 18, and All. 10.

(e) 1 Term Rep. 287.

(b) *Ib.* 414. by Mr. Serjt. Williams.

(d) 3 Wils. 530, and 2 Blac. Rep. 934.

1805.
 LIVERPOOL
 Water-works
 Company
 against
 ATKINSON.

[511]

tract call for any restriction. It is indeed recited, That the obligor had agreed to collect the company's rents for 12 months; but there are no words to restrain his service to that period; and it is plain, from the whole context, and from the particular wording of the condition, that the contracting parties contemplated that his service might continue after that period; and therefore the operative part of the condition compels the obligor to account during the whole time he shall be employed. He is to collect the sums which shall *annually* grow due to the company, which looks to a continuance of his employment from year to year; and he is to account to them and *their successors*. Then again he is to observe their orders *so long as* he shall *continue* to be employed by them; and the very word *continue* supposes some prior service. This is analogous to the common case of an Act of Parliament, enacting a provision in general terms more extensive than the particular case recited, which gave rise to the law. A recital is no material part of a deed; (a) and can only be called in aid to construe some ambiguity in the subsequent operative part of the instrument: it cannot confine subsequent words, whereby the intent appears more large; (b) but if there be any doubt upon the words taken altogether, they must be construed most strongly against the obligor. (c) In that respect, the case of Lord *Arlington v. Merricke* is distinguishable from the present; for there the recital, That Lord *Arlington*, the Postmaster General, had, by his written instrument, under seal deputed *T. J.* to be his deputy of the stage of *Oxford* for six months, might be considered as the words of Lord *A.* himself; and therefore to be taken most strongly against himself, when attempting to extend the deputation beyond the terms of his own grant.

[512]

Lord ELLENBOROUGH, C. J. The case of Lord *Arlington v. Merricke* runs on all fours with the present. The words there used, which were as general as these, were construed to be restrained by the recital stating an appointment for a specific time; and that case was decided by Lord C. J.

(a) *St. John v. Diggs*, Hob. 130; *Bath v. Montague*, 3 Chan. Cas. 101.

(b) 2 Roll. Abr. 247, tit. *Parols*, pl. 7. 4 Com. Dig. *Parols*, 346, A. 19.

(c) *Plowd.* 10.

Hale, and other Judges on great consideration. Then, with a decided case exactly in point, it would be extraordinary if we were to apply a different rule of construction; though, if it were to be decided now for the first time, I should think that decision right. The case immediately in judgment, which is that of the principal in the bond, must be considered as if it were the next case of the surety; for they both engage in the same words; and we cannot put a construction upon them against the principal which would be injurious to the rights of the surety. Now here the condition of the bond recites, That the defendant had agreed with the company to collect their revenues from time to time for 12 months from the date of the bond; and that the company had required security for the due performance of the said office (*i. e.* for 12 months) in the manner and to the effect after mentioned; and then it prescribes the manner and effect of the duty to be performed; and then follow the general words, “during the continuance of *such* his employment;” which word *such* is a word of reference: and by leaving it out, and inserting instead thereof the words to which it refers, that is, “for 12 months from the date of the obligation,” the time stipulated for, the whole will be made clear and consistent; and these words might have been added, with a view to the possible determination of the employment by consent within the year. So the word *annually*, as used, means no more than that the defendant should account, during those 12 months, for all the rents and sums of money which should *annually* grow due: and as to the word *successors*, it was certainly useless to add it, as the company are a corporation; and nothing can be inferred from its insertion. There is therefore nothing to distinguish this from the case of *Lord Arlington v. Merricke*; and it is different from the case cited from *Rolle’s Abridgment*, where the subsequent words of the condition extended the obligation to pay the money not only after the return of the ship to any port in *England*, as mentioned in the recital; but also, “or elsewhere, where she made her right discharge,” though that is an extreme case, which seldom fails to be cited on these occasions.

GROSE, J. The case of *Lord Arlington v. Merricke*, which is the leading case on this subject, must govern the present,

1805.

LIVERPOOL
Water-works
Company
against
ATKINSON.

[513]

1805. to which it closely applies ; and there is good sense in it, independent of its authority ; for any man called upon as a surety to subscribe to the obligation, would naturally understand, on reading the condition, that he was only to answer for his principal for 12 months.

LIVERPOOL
Water-works
Company
against
ATKINSON.

LAWRENCE, J. Lord *Arlington v. Merricke* is the leading case ; and was recognized by Mr. Justice *Buller* in *Barker v. Parker*. (a) The recital in the condition clearly limits the obligation to 12 months from the date, and the subsequent words, “ during the continuance of such his employment,” and “ so long as he should continue to be employed,” were intended to confine the responsibility to the time that he should be in office, not exceeding 12 months.

[514] LE BLANC, J. The contracting parties first stipulated for the defendant's employment in the office of collector and receiver for 12 months : then the subsequent stipulations by the defendant to account, &c. during the continuance of his employment, and for so long time as he should continue to be employed by the company, refer to the original employment in point of time.

Judgment for the Defendant.

(a) 1 Term. Rep. 295.

Wednesday,
June 19th.

The KING against SKONE.

There lies no appeal to the Sessions from a conviction by two justices upon the stat. 42 G. 3. c. 38. s. 30. for wetting corn in a certain stage of the process of malting ; for the clauses of appeal in former excise laws, to which there is a general reference in this Act, extend not to convictions for penalties by two justices.

THE Defendant, a malster, was convicted by two justices of the peace for the county of *Somerset*, for an offence against the Act of the 42 G. 3. c. 38. s. 30. in having wetted, &c. his corn whilst making it into malt, in a certain stage of operation, viz. upon the floor, after the same had been taken from his cistern used for the steeping of the said corn, and before the expiration of 12 days from the time of steeping it ; contrary to the form of the statute, &c. ; and was thereupon adjudged to forfeit 200*l*. An appeal was lodged at the Quarter Sessions against this conviction, and the same was quashed by that Court. These orders having been removed by *certiorari* into this Court at the suit of the Crown.

The *Solicitor General* on a former day obtained a rule, calling on the defendant to shew cause why the order of Sessions

Sessions should not be quashed, upon the ground that no appeal lay to the Sessions from the conviction in this case, and therefore that they had no jurisdiction to make the order for quashing it.

1805.

The King
against
SKONE.

Pell (and *More* was with him) now shewed cause (after noticing that the *certiorari* was taken away in this case; which was answered by observing that the orders had been removed into this Court by *certiorari*, at the suit of the Crown, which was not affected by that provision of the statute) contended, that an appeal lay to the Sessions from the conviction of the justices. The offence is created by the stat. 42 Geo. 3. c. 38. s. 30. which gives a penalty of 200*l.* Sect. 36, says, that the penalty may be recovered, &c. by such ways as any fine, penalty, or forfeiture may be recovered, &c. by any law or laws of excise, or by action of debt, &c. This has reference to stats. 12 Car. 2. c. 23. s. 31 & 32; and c. 24. s. 45 & 46. which enable the penalties of the excise laws to be recovered on conviction before two justices of the peace, or on their default, then by sub-commissioners, and give an appeal to the Sessions from the judgment of the sub-commissioners. Then s. 37. of the 42 Geo. 3. c. 38. incorporates "all the powers and authorities, &c. penalties, forfeitures, clauses, matters and things" of the stat. 12 Car. 2. c. 24. or of, any other law of excise, into that Act. [Lord *Ellenborough*, C. J. observed, that the clause referred to in the 12 Car. 2. c. 24. giving the jurisdiction to the justices and the appeal, has not the word *penalties*.] It has the words "all forfeitures and offences;" and the word *penalties* seems to have been omitted by mistake; for in the stat. 20 Geo. 3. c. 35. for granting additional duties on malt, there is the same incorporating clause (s. 22.) as in this Act, with this difference only, that after the word *duties* is added, "or penalties;" and these statutes are in *pari materia*. The stat. 12 Car. 2. c. 24. which gives an appeal to the Sessions from the judgment of the sub-commissioners, is silent as to any appeal from a conviction by two justices of peace; but that is supplied by stat. 12 Ann. c. 2. s. 37. the first Malt Duty Act, which expressly gives such appeal against any conviction by any justices of the peace for any *penalty* or forfeiture incurred by that Act touching the duties thereby granted, and takes away the *certiorari*. Then the stat. 6

Geo.

[515]

[516]

1805.

The KING
against
SKONE.

Geo. 1. c. 21. s. 22. in general terms enacted, that every forfeiture made by virtue of an act relating to the duties of excise, &c. shall and may be proceeded upon and adjudged in the manner thereby prescribed; "and that such proceedings should not be liable to any *appeal*, or be removed by *certiorari*." After which it became a doubt whether the appeal in the cases of penalties in respect of the malt duties was not taken away; though it is observable that by *s. 10.* of the same Act such appeal is expressly recognized, and provision made for its more effectual application to the real merits of the case, and to enable the Sessions to amend all defects of form in the original conviction. However, all doubt was removed by the stat. 1 *Geo. 2. st. 2. c. 16. s. 3.* which declares that the last-mentioned Act shall not be construed to extend to take away the right of appealing to the Sessions "in cases where judgment is given by two or more justices of the peace in causes and prosecutions before them for or on account of forfeitures and offences relating to the duties on malt," &c. The like appeal is given in other cases; in respect of the duties on leather, by stat. 9 *Ann. c. 11. s. 36.*; on soap and starch, by stat. 23 *Geo. 2. c. 21. s. 37.*; and on plate, by stat. 31 *Geo. 2. c. 32. s. 11.* To oust the appeal then, it must either be shewn that the incorporating clause, *s. 37* of stat. 42 *Geo. 3. c. 38.* does not refer to the stat. 12 *Ann. c. 2. s. 37.* giving the appeal as to malt, or that there is some other act taking away the appeal in case of malt; in which case there would be conflicting provisions incorporated in the Act in question, and the case of *The King v. The Justices of Surrey* (a) might be referred to in aid of the Crown. That was a conviction by two justices upon the stat. 25 *Geo. 3. c. 72. s. 9.* for printing cotton before it was measured and marked by the excise officer. It was not contended that an appeal was given in the particular case, but only that as an appeal was given by some of the Acts relating to the excise, and that the general provisions of all the excise laws were referred to and incorporated in the Act in question, therefore the clauses of appeal were also incorporated: but that construction was rejected by the Court; and *Ashhurst, J.* in giving judgment observed, that it would involve a contradiction; and that

[517]

(a) 2 Term Rep. 510.

the power of appealing was to be considered as a special provision only, and not to be extended beyond the particular instances in which it was expressly given, of which malt was recognized to be one. [Lord *Ellenborough* here observed, that the great difficulty was to shew that the statute in question contained competent words of reference to any clause of appeal including cases where the proceeding was for a penalty; for that word is omitted in the appeal-clauses of the stat. 12 *Car.* 2. c. 24. and the explanatory Act of the 1 *Geo.* 2. st. 2. c. 16.] In the latter part of the appeal-clause in the statute of *Car.* 2. the word penalties is included; and power is given to all justices, “on complaint or information of any such forfeiture made or offence committed contrary to the Act, to summon the accused, &c. and on due proof thereof, &c. to give judgment, and issue their warrants for the levying of such forfeitures, penalties, and fines, as are imposed by the Act for any such offence committed,” &c.: it seems, therefore, as if the word *penalties* had been omitted by mistake in the former part. [Lord *Ellenborough*. That part of the clause relates merely to the levying of the penalties, &c. on conviction. The 37th sect. of the stat. 42 *Geo.* 3. c. 38. has general words of reference to all matters and things in any excise law; which if they do not include the appeal-clause in the stat. 12 *Ann.* c. 2. will have no other effect than what would result from the 36th section. They include all powers of mitigating given by any former law; which cannot apply to the collectors, who have no power of mitigating, as the justices have. So the word *adjudging* in the incorporating clause, must refer to penalties and not to duties.]

LORD ELLENBOROUGH, C. J. It is no question for us whether it would be expedient that there should be an appeal to the Sessions in this case, of a conviction before two justices of the peace for a penalty in respect of the malt duty: If there be no words of reference to any Act giving such an appeal, we cannot supply the want of them. Now the clauses in the statutes of *Car.* 2. and *Geo.* 2. have not the word *penalties* in those parts giving the appeal; and when that word occurs in other clauses, in other respects *fac-similes*, it seems as if the omission were intentional; but if it were not intended,

1805.

The King
against
SKONE.

[518]

1805. tended, we can only say of the Legislature *Quod voluit non dixit.*

The KING
against
SKONE,

Per Curiam,

The Order of Sessions quashed.

The Solicitor General, Garrow, Newbolt, and Courtenay were to have sustained the conviction,

[519]

Thursday,
June 20th.

RUSHFORTH and Another, Assignees of B. and W. RUSHFORTH,
against HADFIELD and Others.

The lien of a common carrier for his general balance, however it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by clear and satisfactory instances sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm, yet is not to be favoured, nor can be supported by a few recent instances of detention of goods by four or five carriers for their general balance.

But such a lien may be inferred from evidence of the particular mode of dealing between the respective parties.

THIS was an action of *trover*, to recover the value of a parcel of goods belonging to the bankrupts before their bankruptcy, and sent on their account to be carried by the Defendants, common carriers, from *Ellen and —* to *London*, and which were detained by the defendants after tender of and refusal by them to accept the price of the carriage of such goods until a balance of 78*l.* 15*s.* 7*d.* due to them from the bankrupts for the carriage of other goods at other times was paid: and the question was, Whether the defendants, as common carriers, had a lien on the goods for their general balance? At the trial before *Graham, B.* at the last assizes at *York*, the defendants' counsel offered evidence to shew, That by the usage of trade throughout the realm, common carriers had a right to retain particular goods belonging to a party for their general balance due from the same party for the carriage of other goods belonging to him; and cited *Aspignall, assignee of Howarth v. Pickford*, (a) before Lord *Kenyon*, at *Nisi Prius*, in *June* 1800, when that point was ruled, and not questioned afterwards; and they referred also to the doctrine laid down in *Green v. Farmer*, (b) that the convenience of commerce and natural justice are on the side of liens, and that of late years courts have leant that way, either where there was an express contract, or where it was implied from the usage of trade, or from the manner of dealing between the parties in the particular case, or where the party acted as a factor. On the other hand, the case of *Oppenheim v. Russell* (c) was

* [520]

(a) 3 Bos. & Pull. 44. note.
(c) 3 Bos. & Pull. 42.

(b) 4 Burr. 2211 and 2221.

relied

relied on, as having overruled, or, at least, shaken the opinion of Lord *Kenyon* in *Aspinall v. Pickford*; but, as in *Oppenheim v. Russell*, the only point in judgment was, That the right of the consignor to stop *in transitu* could not be affected by the carrier's claim of lien in respect of the constructive possession of the consignee, the learned Judge admitted the evidence of usage, on the authority of *Green v. Farmer*, and *Aspinall v. Pickford*. The defendants then called witnesses, the first of whom had been book-keeper to them and their late father in the country near 20 years, who swore that their custom had been to detain for the balance due to them from any person for whom they carried goods, if there were any suspicion of his failing; and he specified two instances of detention of particular goods till payment of the general balance, one on the 9th *May*, 1803, in the case of a Mr. *Burton*; and the other on the 23d of *May*, 1803, in the case of a Mr. *Batten* who had failed, and where the payment was for some time objected to. The same witness said, That he knew there were other instances, but he could not recollect the particulars: on one occasion the dispute arising upon the detention was left to arbitration. Another witness, who had been book-keeper to the defendants in *London* for 5 years, also spoke to their having several times stopped goods received by them as carriers; but could only specify one instance, when the carriage was paid immediately. One *Wilsley*, who had been a carrier from *York* to *Manchester* above 20 years, deposed generally to his having always stopped goods till the general balance was paid: and remembered two instances in particular. *Henley*, a carrier from *London* to *Newcastle* for above 20 years, gave the like general evidence; and recollected two or three times when he had so stopped goods that actions were threatened, but never brought. He also said, that they could not collect the price of the carriage for each journey. *Denman*, a carrier from *London* to *Lincoln*, *Hull*, and other places, for five or six years past, said, That the custom was to retain till the general balance was paid, and spoke to one instance two years ago, where he so held goods of the value of 1000*l.* (a) against the assignees of a bankrupt for a claim of 130*l.*; and after holding the goods for six months, and

1805.

RUSHFORTH
against
HADFIELD.

[521]

(a) Qu. 10,000*l.* vide post,

being

1805. being threatened with an action, he was paid his balance; and *Norris*, another common carrier, from *Halifax* to *London*, for four years past, had known instances of detaining goods for the general balance, particularly the case of one *Renshaw*, a bankrupt, where the goods were redeemed by the assignees. On the part of the Plaintiffs, it was objected, That this evidence did not prove a general usage of the trade: but the learned Judge thought that, being uncontradicted, it admitted of that conclusion; and, therefore, he directed the jury, that if they found that such was the general undisputed usage, it established the right of the carriers; and they thereupon found a verdict for the defendants; which was moved to be set aside in the last term, as a verdict against law and evidence: and a rule *nisi* having been granted,

RUSHFORTH
against
HADFIELD.

[522]

Park and *Wood* now shewed cause, and relied on the general doctrine in *Green v. Farmer*, (a) confirmed in its application to the present subject by the opinion of Lord *Kenyon* in *Aspinall v. Pickford*, (b) where the same conclusion of law and fact was drawn as in this case; and they relied on the instances given in evidence at the trial of the assertion of the carrier's claim of lien for his general balance. [Lord *Ellenborough*, C. J. A common carrier is bound by the custom of the realm to carry goods for a reasonable reward to be paid for the same goods, and the law gives him a lien on the particular goods for the price of the carriage of them; and by special contract with the customer, he may extend that right to a lien for his general balance; but if it be insisted on that there is a general custom of trade applicable to all carriers to have a lien for their general balance, it should be shewn in a very different manner in evidence. Common carriers have already gone a great way in cutting down the general right of the subject, in limiting their general liability by special notices; and now they are striving on the other hand to extend their lien to cover their general balance. These continual encroachments will require the interference of the Legislature.] A lien for the general balance as between the same parties, is founded in equity; and in modern times it has been extended to dyers

(a) 4 Burr. 2214 and 2221.

(b) 3 Bos. & Pull. 44. n.

and others upon general notices. (a) So in *Naylor v. Mangles*, (b) where the question was, Whether a wharfinger had such a lien? Lord *Kenyon* said, That liens were either by common law, *usage*, or agreement; that a lien from usage was matter of evidence; and that the usage in the case of wharfingers had been proved so often, that he should consider it as a settled point that they had the lien contended for. The struggle in *Oppenheim v. Russell* (c) was to extend the lien of the carrier upon the goods of the consignee against the consignor of the goods, who had stopped them *in transitu*; but here the claim of the carrier is confined to his lien on the goods as against the party himself for whom he has been accustomed to carry, and with whom he has a privity of contract. The claim is founded upon general usage, which has superadded to his common law lien for the price of the particular goods, another lien for his general balance. There is nothing inconsistent or illegal in this: and it is more convenient to trade that the carrier's lien should be thus extended, to avoid the delay and inconvenience of withholding the delivery of each particular parcel of goods till payment of the carriage of it. The usage proved at the trial was sufficient *prima facie* to found the verdict; and was not opposed by contrary evidence. There was no necessity for carrying it very far back, because it might arise within 20 years: in fact, the usage was sworn to have existed as far back as that period. At the time of *Green v. Farmer* (d) in 1768, it was holden that a dyer had no lien for his general balance, but only for the dyeing of the particular goods; though since that time such a lien has been established. (e) Common notoriety of usage

1805.

RUSHFORTH
against
HADFIELD.

[523]

[524]

is

(a) *Kirkman v. Shawcross*, 6 Term Rep. 14.

(b) 1 Esp. N. P. Cas. 109; vide also *Spears v. Hartley*, cor. Id. Eldon, C. J. 3 Esp. N. P. Cas. 81, S. P.

(c) 3 Bos. & Pull. 42.

(d) 4 Burr. 2214.

(e) The same was said in the argument of the case of *Whitehead and Others*, assignees, of *Mitford v. Vaughan*, Tr. 25 Geo. 3. B. R. which turned upon the lien of a policy-broker, that since the case of *Green v. Farmer*, dyers had been ruled to have a lien for their general balance: but I have not been able to meet with any such case; nor was there any allusion made to it in *Kirkman* and *Another*, assignees of *Walker v. Shawcross*; 6 Term Rep. 14; where the dyers, dressers, whistlers, printers, and callenderers of Manchester and its neighbourhood, established a lien for their general balance, upon proof of a special advertisement to that effect, and notice of it by the contracting party; and in *Close and Another*, assignees of *Ridell v. Waterhouse and Others*, which was trover for woollens delivered by the bankrupt before his bankruptcy to the defendants, dyers at Halifax, to be dyed; where a tender

1805. is sufficient in these cases, and affords a reasonable presumption for the jury to conclude that the parties contracted with the knowledge of and assent to such usage.

RUSHFORTH
against
HADFIELD.

[525]

Cockell, Serjt. in support of the rule. There was no such general or long-established usage proved as warranted the jury to find the general lien against the custom of the realm, which only gives common carriers a lien for the price of carrying the particular goods in their hands; and though some of the witnesses spoke in general terms of the existence of such a usage further back, yet none could specify any particular instance till within the last five years, although the occasion must have continually occurred; but as the custom of the realm pervades throughout, any usage which is to over-rule it, ought to be as generally and unequivocally established; for it was not pretended that there was any evidence from whence the jury could infer a particular dealing between these parties, as in *Kirkman v. Shawcross*. A common carrier stands in a very different situation from traders in general; he has an obligation cast upon him by law, to carry for a reasonable reward; and, therefore, there must always be a strong presumption against any usage which infringes upon the right of the subject to make him carry and deliver his goods at the appointed place for a reasonable price for the carriage of the particular goods: and to that extent only the case of *Oppenheim v. Russell* (a) was relied on; but a workman who is to bestow his labour on the goods, and is not compellable to receive them at all, may engraft conditions upon his receipt of them, a stipulate for a lien for his general balance; and thence a less degree of evidence may be sufficient to raise a presumption that the parties contracted on the footing of such a lien.

tender had been made of the price of dying the particular goods; but the defendants claimed to retain for their general balance for the expence of dying other goods, on the ground of usage; the jury at the trial, before Rooke, J. at York, negatived any such usage at Halifax, and found a verdict for the plaintiffs: and on a motion for a new trial in Tr. 42 Geo. 3. the Court of B. R. finally discharged the rule; being of opinion that, as the usage was negatived, the defendants could not retain for the price of dying any other than the particular goods dyed, or at most only for the dying of such goods as were delivered to them at one and the same time under one entire contract; and that at any rate the circumstance of the defendants having had different parcels of goods in their hands at one time which had been delivered at several times, did not give him a lien on the goods in question remaining in their hands for the price of dying such other distinct parcels as had been returned to the owner.

(a) 3 Bos. & Pull. 42.

LORD ELLENBOROUGH, C. J. There was no sufficient evidence on which the jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it. The lien claimed by the carriers for their general balance is not founded in the common law; for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward *to be therefore paid*; by force of which, he has a lien only for the carriage price of the particular goods. Then, What proof is there of any further lien by usage? I will not say that there may not be sufficient evidence of such a general usage for the carrier to let out of his hands the particular parcel on which is common law-lien attaches, without receiving the carriage price of it at the time, upon a general agreement, of which such usage would be evidence, that he may retain any other parcel belonging to the same party for the whole of his demand: but such a general usage ought to be proved by stronger evidence than was offered in this case, especially as it trenches upon the common law right of the subject; but if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their particular contract. The case, however, does not appear to have gone to the jury on this view of it. There had been previous dealing between these parties; and there might have been evidence to shew, if such had been really the case, That it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered: but that was not resorted to; but it was left to the jury as a case turning on the general usage of carriers throughout the realm to have a lien for their general balance, without any sufficient evidence before them to warrant them in drawing so extensive a conclusion. The oldest instance which could be particularized was not above five years ago; and but one instance, and that only two years ago, of the exercise of the claim to any considerable amount, so as to make it worth while to resist it. To justify, however, so extensive a claim upon the ground of general usage, there ought

1805.

RUSHFORTH
against
HADFIELD.

[526]

1805. ought to be evidence of instances more ancient, more numerous, and more important.

RUSHFORTH
against
HADFIELD.

[527]

GROSE, J. I should object to making a precedent in a case of this sort, where a general conclusion is to be drawn from such insufficient premises. A carrier may have a lien either at common law for the carriage of the particular goods; upon which there is no question; or it may arise out of the usage of trade; or by a particular contract between the parties concerned. If it could be claimed by the general usage of trade, I should rather have thought that it should have been coeval with the common law liability of the carrier: but, at any rate, there was no evidence here sufficient to warrant the jury in finding any such general usage of trade; and as to any lien in respect of a particular contract, it was not left to the jury on that ground.

LAWRENCE, J. I agree that there ought to be a new trial. Common carriers are every day attempting to alter the situation in which they have been placed by the law. At common law they are bound to receive and carry the goods of the subject for a reasonable reward, to take due care of them in their passage, and to deliver them in the same condition as when they were received: but they are not bound to deliver them without being paid for the carriage of the particular article; and, therefore, they have a lien to that extent. Of late years, however, they have been continually attempting to alter their general character by special notices on the one hand, to diminish their liability; and, on the other hand, by extending their lien: but, What evidence have we in this case to say that their common law-situation is altered? To do that, it must be shewn that both parties have consented to the alteration: the carrier cannot alter his situation by his own act alone. It is said that a general lien is convenient to the parties concerned: I do not say that it may not be so, but it must arise out of the contract of the parties. It may be convenient enough for the customer to say, that in consideration that you, the carrier, will give up your right to stop each particular parcel of goods for the price of the carriage, I will agree that you may stop any one parcel of my goods for the carriage price of all together; but still this must be by contract between them; and usage of trade is

[528]

is evidence of such a contract; and where such a usage is general, and has been long established, so as to afford a presumption of its being commonly known, it is fair to conclude that the particular parties contracted with reference to it. Then, if in this case there had been evidence of a usage so uniform and frequent as to warrant an inference that the parties contracted with reference to it, it should have been left to the jury to infer that it was part of their contract.

1805.

RUSHFORTH
against
HADFIELD.

LE BLANC, J. I doubt whether the jury had this case presented to them in the true light in which by law it should have been; for it was left to them to find for the defendants, upon the bare ground of there being evidence of a general usage amongst carriers to retain for their general balance; but no usage of carriers would be sufficient to bind other parties, unless it were so general as to furnish an inference that the party who dealt with the carrier had knowledge of it, and so to warrant a conclusion that he contracted with the carrier on that ground. General liens are a great inconvenience to the generality of traders, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body at large of the creditors, instead of coming in with them for an equal share of the insolvent's estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionally amongst all the creditors, and they ought not to be encouraged: but I do not mean to say that a usage in trade may not be so general and well established as to induce a jury to believe that the parties acted upon it in their particular agreement; and I cannot say that such an agreement would not be good in law, although a carrier might have no right to refuse carrying goods for another without an agreement that he should have a lien for his general balance; for that would be contrary to the obligation which the law has imposed on him. The instances of detainer by carriers for their general balance which were proved at the trial, were very few and recent, with a view to found so extensive a claim; and the instance where goods of the value of 10,000*l.* were detained for 130*l.* does not appear to me to assist the claim; for the parties would naturally rather
pay

[529]

1805. pay 130*l.* the amount of the balance due to the carrier, than have goods of such great value detained from them till the question were decided by law. Without saying, RUSHFORTH *against* HADFIELD. therefore, that there may not be such a usage as that insisted on, I am clearly of opinion that there should be a new trial, in order to have the case submitted to the jury on its true ground; which it does not appear to have been upon the last trial.

Rule absolute.

[530]
Friday,
June 21st.

DOE, on the Demise of THOMAS BROMFIELD, and MARY, his Wife, *against* SMITH, Widow.

A. agreed to let her house to *B.* "during her life, supposing it to be occupied by *B.* or a tenant agreeable to *A.*" and "a clause was to be added in the lease" to give *A.*'s son an option to possess the house when of age: held, That this was only an agreement for a lease, & not a perfect lease, the latter clause shewing it to be executory; and that a lease granted in pursuance of such agreement would only enure for the joint lives of *A.* & *B.*; & therefore, that *B.* having continued in possession of the premises under the agreement to the time of his death, his interest then determined, and that *A.* might maintain ejectment against *B.*'s executrix, who had possessed herself of the premises.

THIS ejectment was tried before *Grose, J.* at the last *Derby* assizes, when a verdict was taken for the Plaintiff, subject to the opinion of this Court, on the following case:—*Mary Bromfield*, one of the lessors of the plaintiff, being under coverture, and entitled to the premises in question, and having full authority for that purpose, entered into the following agreement in writing with *William Smith*, the husband of the Defendant:—"3d March, 1778. Agreed this day to let to Mr. *Smith*, my house situate in the Wardwicke, *Derby*, at the yearly rent of thirty guineas, he paying the taxes; also an inclosure called the *Gallows Intack*, at the yearly rent of 7*l.* The above agreement to continue during my life, supposing it to be occupied by himself or a tenant agreeable to me. A clause to be added in the lease to give my son a power to take the house for himself, if he chooses, when he comes of age." No other lease was ever prepared in pursuance of it. *W. Smith* took possession of the premises, and occupied them himself under the agreement till his death on the 19th of Nov. 1803, and paid the rent and taxes. The defendant is his widow and executrix; and has continued to occupy the premises since his death. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover?

After the case had been opened at the bar, and *Reader*, of

counsel

counsel for the plaintiff, assuming for the sake of the argument that this was a lease, was proceeding to shew that it was not a lease absolute for the life of Mrs. *Bromfield*, * but only during the joint lives of Mrs. *Bromfield* and *Wm. Smith*, and consequently that the interest expired on his death. The Court, referring to that part of the agreement which stipulated for “a clause to be added in the lease,” were decidedly of opinion that those words, importing that something ulterior to the agreement was to be done by way of a regular lease, shewed the intention of the parties to be, That the writing in question should operate only as an agreement for a lease, and not as the lease itself; and Lord *Ellenborough*, C. J. referred to *Goodtitle d. Estwick v. Way*; (a) *Doe d. Coore v. Clare*, (b) and *Doe d. Jackson v. Ashburner*, (c) as having settled the point; and asked if this did not make an end of the case, as the legal title was at all events in the lessors of the plaintiff; but on its being suggested by the defendant’s counsel that there ought to have been a notice to quit, which had not been given,

Reader, for the plaintiff, said, That at all events, if a lease had been granted pursuant to the terms of the agreement, it would have terminated with the death of *Wm. Smith*; and that since then nothing had happened to create any new tenancy between the lessors and the defendant, so as to entitle her to a notice to quit. If the agreement had stopped at the words “supposing it to be occupied by himself;” it is clear that it would at most have been only a lease for the joint lives of Mrs. *B.* and *W. S.*; for it would be a demise during her life and his occupation; and as on his death he could no longer occupy the premises, one condition of the lease necessarily failed. Then the subsequent words, “or a tenant agreeable to me,” only meant to give *W. S.* the option of occupying the premises either by himself or an *under-tenant*, provided such *under-tenant* were agreeable to his lessor; but this permission could not enlarge the estate granted to *W. S.* so as to extend his interest beyond his life; for the occupation then could not be referred to him; but if an executrix could be considered as an *under-tenant* to the deceased, yet the lessor has shewn

1805.

DOE ex dem.
BROMFIELD
against
SMITH.
* [531]

[532]

(a) 1 Term Rep. 735.

(b) 2 Term Rep. 739.

(c) 5 Term Rep. 163. The same rule was laid down in *Doe d. Cawood v. Banks*, E. 27 Geo. 3, B. R.

1805.
 —
 DOE ex dem.
 BROMFIELD
 against
 SMITH.

her disagreement to such an underletting, by bringing this ejectment. A proviso for re-entry in case of any assignment of the premises by the tenant, even under a commission of bankrupt, has been holden to be valid in *Roe v. Galliers*; (a) *a fortiori*, therefore, a condition of that sort shall bind the personal representatives of the tenant. *Buller, J.* in that case, said, "It is clear that the landlord parted with the term on account of his personal confidence in his tenant: that is manifestly the case in all leases where clauses against alienation are inserted," &c.;—and again, "Suppose a lease were made for 21 years, on condition that the tenant shall so long continue to occupy the land personally, there could be no objection made to such a condition." Now, this is in effect the same; the lease at all events terminated on the death of *W. S.* which made an end of the personal confidence, and no interest ever vested for an instant in his executrix. He also referred to *Co Lit.* 204, a, and *Chichley's case, Dy. 79, a. (b)*

[533]

Clarke, contrà. The legal effect of the agreement altogether is, and equity would have compelled the execution of it accordingly, that *Mrs. Bromfield* should grant a lease to *W. S.* for her own life, with a covenant by him not to underlet without her consent. The words of agreement to lease are those of the lessor, and therefore to be taken most strongly against her: they are "during my life:" and then she annexes the condition on the tenant of occupation "by himself or a tenant agreeable to me." The tenant therefore had an interest in the term during *Mrs. Bromfield's* life, subject to be defeated by his underletting to one who was not agreeable to her. He could not have determined his interest against his lessor's consent merely by ceasing to occupy or by underletting to another; for she might have waived taking advantage of the condition broken. Again: If the lessor had consented to the under-lease, the tenant would have been entitled to hold during her life; for in that event the alternative of the condition would have been complied with; that is, it would have been a lease for her

(a) 2 Term Rep. 133.

(b) *Vide Co. Lit.* 214, b, as to the distinction between a condition annexed to a freehold, and one annexed to a lease for years, where no entry is necessary; and *ib.* 234, b, as to words of limitation, which are conditions in law.

life upon a condition performed, viz. the occupation of the premises by a tenant agreeable to her. Then, after her acceptance of the under-tenant, the other alternative of the occupation of *W. S.* would have been waived, and consequently his death afterwards could not have affected the duration of the lease. This shews that the lease, if granted, would not necessarily have expired with *W. S.*'s life. But further : Such a proviso in a lease would have been restricted to voluntary assignments, or such assignments by law as arise out of the voluntary acts of the tenant, and would not extend to his personal representatives when dead ; for such a transfer of possession is worked by operation of law alone. [Lord *Ellenborough*. If a lease had been executed under the direction of the Court of Chancery upon a bill for a specific performance of this agreement, there would have been a covenant required of the tenant not to depart with the possession as not to assign, and to restrict the duration of the lease to his own personal occupation, and exclude executors, &c. as well as assignees in general.] In *Wrenford v. Gyles*, (a) where a lease was for 21 years, if the lessee lived so long and continued in the lessor's service, it was ruled that the lease continued after the lessor's death during the term, it being the act of God that the lessee could not continue in his service. But supposing that the lessor may object to the occupation of the executrix, yet the question must be considered the same as if *W. S.* had before his death underlet to one whom the lessor did not approve of ; and as that would only have made the lease voidable, the ejectment could not have been maintained without an entry to avoid it. At all events, however, there ought to have been a notice to quit, in order to determine the tenancy ; for the instrument of demise operating only as an agreement for a lease, and not as a present demise, *W. S.* was only tenant from year to year under it, and consequently upon his death his executrix also became tenant from year to year ; and her interest could not be determined without a legal notice to quit. (b)

1805.

DOE ex dem.
BROMFIELD
against
SMITH.

[534]

(a) Cro. Eliz. 643. This case was ruled by three Justices against *Walmesley, J.* and it is reported with a quære ; but it is referred to in 4 Bac. Abr. 182. tit. Leases, &c. without any note of disapprobation : and Lord *Ellenborough* now observed on it, that the tenant served as long as he could.

(b) *Vide Doe v. Porter*, 3 Term Rep. 13.

1805. *Reader*, in reply. If the parties meant, as the agreement shews they did, that there should be no change of the personal occupation of the tenant even during his * life, without the consent of Mrs. *Bromfield*, that shews that it could not have been meant to extend the interest beyond his life. In *Wrenford v. Gyles* the object of the demise was not the personal occupation of the tenant, but to secure his service to the lessor, and at any rate to give him an interest for 21 years, if he did not forfeit it by voluntarily withdrawing his service before. Besides, that case did not pass without dissent. Then, as to the necessity of an entry, that is only required to take advantage of a forfeiture, but not when the tenancy is expired : neither is a notice to quit necessary in the latter case.

DOE ex dem.
BROMFIELD
against
SMITH.
* [535]

Lord ELLENBOROUGH, C. J. The point to which my attention was principally directed by the perusal of the paper-book was, whether the instrument operated as an executory agreement for a lease, or where an executed present demise ; and from the authorities which I before mentioned, it appears certain that this was only an agreement for a lease. But from the turn of the argument it may be proper to consider what interest the tenant would have taken if a lease had been executed pursuant to the agreement ; and I think it would have been a lease for the joint lives of himself and Mrs. *Bromfield*, with proper covenants to restrain him from parting with the personal occupation of the premises, during his life, without her consent. The first material words are, that the agreement is “ to continue during my life : ” the term, therefore, could in no event exceed Mr. *B.*’s life. Then it goes on, “ supposing it to be occupied by himself or a tenant agreeable to me : ” those I consider as words of condition, requiring *W. Smith* either personally to occupy the premises, or that he should occupy them by some other tenant agreeable to her ; still regarding it however as in effect, the occupation of *W. Smith* himself. His interest, therefore, ended with his life, and as he continued in possession to the last upon the terms of the agreement, we cannot refer his possession to any other title ; and consequently the ejectment was well brought upon his death without giving his executrix any notice to quit. If any interest had survived to her, the case would have been open to another consideration ; but no interest whatever vested in her.

[536]

GROSE, J. Even supposing that this had been a lease, the meaning of the parties clearly was, that no other person than *Wm. Smith* should at any time occupy the premises, except with the concurrent agreement of him and Mrs. *Bromfield* during their joint lives. Then, Is this defendant a person whom both have agreed to? Surely not. From the nature of the agreement it could only operate during their joint lives; and his death determined his interest.

1805.

DOE ex dem.
BROMFIELD
against
SMITH.

LAWRENCE, J. I had supposed with my Lord that the only question meant to be raised was, Whether this were a lease or an agreement for a lease? and my attention was not previously directed to the point on which the case has been now argued. I do not think that the bringing of this ejectment differs the question between these parties. If any interest vested in the executrix under this agreement, considering the meaning of it to be that the interest should enure during the life of Mrs. *Bromfield*, I should conceive that the executrix was entitled to occupy the premises in the same manner as the original tenant, restrained only from putting in any other occupier without Mrs. *Bromfield's* consent. But I consider the whole agreement as confined to the joint lives of the contracting parties. Mrs. *Bromfield* clearly meant to restrain it to her own life; and then the words which follow, "supposing it to be occupied by himself or a tenant agreeable to me," shew, I think, that it was to be confined to *W. Smith's* life. She looked in truth to his occupation alone; and the latter words do not vary that view of the case; for no other tenant was to occupy the premises without her approbation, and it would still have been considered as the occupation of *W. S.* himself. If then an application had been made to the Court of Chancery by *W. S.* to compel an execution of a lease pursuant to the agreement, it would have been so drawn as to pass the interest only during their joint lives, and consequently all his interest ended with his death.

[537]

LE BLANC, J. It is evident that this instrument was only intended as a minute of a lease, by the reference to a clause thereafter to be added in the lease itself; and that it was only meant to be a letting to *W. Smith* personally; for the lessor only agrees to let to him, without saying his executors,

1805.
 DOR ex dem
 BROMFIELD
 against
 SMITH.

[538]

tors, &c. (a) The subject of the demise was merely a house in a town, with a small close; and she reserved too a power for her son if he chose to take possession of it when he came of age. It appears therefore that she meant to keep as much dominion as possible over the property; and certainly she never meant to admit of any tenant of whom she did not approve. In order then to effectuate this her apparent intention, the Court of Chancery would never have given *W. Smith* such a lease as might vest by operation of law in a person whom the lessor might not like as a tenant: and therefore the interest which he took must be considered as limited to the duration of Mrs *B.*'s life and his own, and to his own occupation. unless she should approve of any other tenant during his life.

Postea to the Plaintiff.

(a) *Vide* the observations of Mr. Justice Buller in *Roe v. Galliers*, 2 Term Rep. 140, upon the case of *Doe d. Lord Stanhope v. Skeggs*, Tr. 21 Geo. 3, B. R. and *vi. Roe d. Gregson v. Harrison*, 2 Term Rep. 425.

Friday,
 June 21st.

M'COMBIE against DAVIES.

Taking the property of another by assignment from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse by way of pledge from a broker who had purchased it there in his own name for his principal; and refusing to deliver it to the principal after notice & demand by him; none other than the person in whose name it is warehoused being able to take it out, is a conversion.

IN *trover* for a certain quantity of tobacco, tried at the sittings after *Michaelmas* Term, 1804, at *Guildhall* before Lord *Ellenborough*, C. J. the Plaintiff was nonsuited, on the ground that there was no conversion by the Defendant. A motion was made in *Hilary* Term last to set aside the nonsuit, and for a new trial, and the opinion of the Court was reserved on the following facts: The plaintiff, a merchant in *Aberdeen*, had employed one *Coddan*, an accredited broker in the tobacco trade, and a dealer in tobacco on his own account, to purchase for him some tobacco; which *Coddan* accordingly did: and the tobacco in question was part of it. But the defendant had no knowledge of the transaction between the plaintiff and *Coddan*. *Coddan*, the broker, bought the tobacco in his own name whilst it was in the king's warehouse, and had it transferred to himself in his own name in the king's warehouse, where it remained subject to the payment of the duties, as is usual, till the tobacco is actually delivered out of the warehouse. *Coddan* being in want of money, pledged the tobacco in his own name with the defendant, for a sum of money, and transferred it into the defendant's name in the king's warehouse.

Afterwards

Afterwards an application was made to the defendant, on the part of the plaintiff, for a delivery of the tobacco in question. The defendant answered, that he had advanced money to *Coddan* thereon; that he did not know *M'Combie*, and could not transfer it but to *Coddan's* order, and not till his advances were paid. On the 6th and 7th of *November*, the following orders were addressed to the defendant:—" *B. A.—L237, 649, 597, 659, 508.*

" *Mr. Davies*, Please to deliver to the order of *Mr. Thomas M'Combie* the above five hogsheads of tobacco, his property.

Nov. 6, 1804.

Yours, &c. *J. R. Coddan.*"

" *Mr. Davies*, I have to request you will immediately deliver to me five hogsheads of tobacco, marked and numbered, &c. (as before) the same being my property, placed in your hands by my broker, *J. R. Coddan*, whose order for their delivery I now hand you; and have to observe, that if you do not deliver them over to me, I shall be under the necessity of entering an action against you to enforce their delivery.

" *London, 7th Nov. 1804.*

" Yours, &c. *T. M'Combie.*"

The defendant received the said orders, but said that he should not deliver the tobacco until he was paid the money he had advanced on them to *Coddan*. The tobacco still remains in the king's warehouse, the duties not yet being paid thereon, entered in the books at the king's warehouse in the name of the defendant.

W. Harrison, for the plaintiff. The tobacco having been purchased by the broker for the plaintiff his principal, the plaintiff had the complete legal property and the right of possession of it; and the broker had no right afterwards to pledge it to the defendant; for this was a *pledge* and not a *sale*. The king had only a lien upon it for the duty while it remained in his warehouse; and on payment of the duty the person in whose name it is entered may at any time remove it. It was as much in the defendant's possession while it remained in the king's warehouse, as if it had been in the custody of a carrier or wharfinger: then his refusing to make the transfer, or give the order for delivering it, was a withholding of the tobacco from the rightful owner, and constitutes a conversion; but at any rate, the assuming any

dominion

1805.

M'COMBIE
against
DAVIES.

1805. dominion over it, and taking it by the wrongful act of the broker, was a conversion.

M'COMBIE
against
DAVIES.

Lord ELLENBOROUGH, C. J. said, That the latter was the true ground to put the plaintiff's case upon; and if the case had been so presented to him at the trial, there would probably have been no nonsuit: but it was put upon the ground that the not giving of an order for the delivery of the tobacco from the king's warehouse was in itself a conversion; in which I could not concur; not conceiving that the mere not doing of an act was a conversion: but taking the case higher up upon principle, I think that the defendant's acts amount to a conversion. According to Lord *Holt*, in *Baldwin v. Cole*, (a) the very assuming to one's self the property and right of disposing of another man's goods, is a conversion: and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for, what is that but assisting that other in carrying his wrongful act into effect.

The other judges assented,—*Lawrence* and *Le Blanc*, justices, observing, That when the defendant was afterwards informed of the plaintiff's rights, and the tobacco was demanded of him, he refused to deliver it.

[541] *Reader*, for the defendant, submitted to the opinion of the Court thus expressed as to the point of the conversion; but suggested that there was no appropriation of the specific tobacco by the broker, who purchased it in his own name, to the plaintiff's use, so as to give him the legal property in it: but,

Lord ELLENBOROUGH, C. J. said, That as between the broker and his employer, there was an appropriation of it to the latter, though it might not so appear to the public at large.

Rule absolute for setting aside the nonsuit,
and granting a new trial.

(a) 6 Mod, 212.

1805.

R. WALSH *against* TOULMIN and Another. (a)Tuesday,
June 25th.

THIS was an action of debt upon the stat. 31 Geo. 2. c. 10. s. 30. against the Defendants, navy agents, to recover penalties incurred by them for having taken more than 6d. in the pound commission, as allowed by that Act, in respect of monies received by them on account of Lieut. *John Walsh*, commander of his Majesty's late gun-brig the *Pelter*. At the trial before Lord *Ellenborough*, C. J. at the sittings after *Hilary* Term last, a verdict was found for the Plaintiff, to be entered on the 11th or 12th count as the Court should direct, subject to the opinion * of the Court, on the following case:—The 11th count stated, That before and at the time of committing of the offence after-mentioned, the defendants had been and then were employed by one *John Walsh*, then an officer in the royal navy, and lieutenant of the *Pelter* gun-brig in the king's navy, in the receiving of certain wages, prize-money, and other money due to the said *J. W.* upon account of his service in the royal navy: and being so employed, the defendants afterwards and before the committing of the offence after mentioned, viz. on the 18th of *April*, 1804, received for *J. W.* upon account of his service in the royal navy as aforesaid, a large sum, viz. 135*l.* 18*s.* 1*d.* Yet the defendants, not regarding their duty nor the statute, &c. after the receipt of the said sum of money, viz. on the 19th of *May*, 1804, at, &c. *did demand* for receiving thereof, and for paying the same to *J. W.* the person by whom the defendants were employed as aforesaid, or according to his direction, and for their trouble and attendance, *an allowance or valuable consideration, not exceeding in the whole the sum of 6d. in the pound* for the monies so recovered, viz. 13*l.* 4*s.* 6*d.* contrary to the form of the statute, &c.; by reason whereof, and by force of the statute, the defendants forfeited for their said offence

Section 30 of the stat. 31 G. 2. c. 10. which inflicts a penalty of 50*l.* on navy agents demanding, taking, or retaining more than 6*d.* in the pound for receiving and paying over wages, &c. to any officer, seaman, or other person in the royal navy, and for all their trouble and attendance in relation thereto, is not confined to inferior officers and seamen, as many of the provisions of that statute are; & therefore navy agents demanding and receiving of a lieutenant in the navy more than 6*d.* in the pound upon the sum in fact received and paid over to him by them, tho' not more than 6*d.* in the pound upon the whole account of debt or & creditor, including sums drawn for by the lieutenant himself upon the navy

office, and paid and carried to his account by that office (which is authorized by stat. 35 Geo. 3. c. 94. making special provision for paying the wages, &c. of commissioned officers) are liable to the penalty: and the latter Act is not a repeal of the former provision as to the payment of wages, &c. of commissioned officers.

* [542]

(a) I am indebted for this note to the assistance of some friends in court, having been obliged to leave the court soon after the case was opened at the bar.

50*l.*, &c.

1805. **50l. &c.** The 12th count, which was similar in other respects to the last, charged that the defendants did *retain* for receiving the money and for paying the same to the said *J. W.* and for their trouble and attendance, an allowance or valuable consideration, exceeding in the whole the sum of 13l. 4s. 6d. &c. The case then stated, That prior to the defendants becoming agents to Lieut. *Walsh*, Mr. *Lawson* was his navy agent for the said gun-brig, from the year 1796 to the 3d of *July*, 1801; during which time, Lieut. [543] *Walsh* drew several bills on account of pay and wages, three of which, to the amount of 82l. 13s. were remitted to Mr. *Lawson*, *not as agent, but as negotiable securities in the ordinary course of business*; and he received the same, and charged commission on them. On the 26th of *November* 1803, the defendants were appointed by Lieut. *Walsh*, his agents, by power of attorney; and in *Feb.* 1804, made out and delivered to him the following account, and paid him the balance of 138l. 17s. 6d. viz.

1803.	£	s.	d.
Nov. 26, To power of attorney	0	17	0
Dec. 15, To making out account per <i>Petter</i> , with stamps	6	5	0
27, To paid Mr. <i>Lawson</i> balance of his account	20	7	4
31, To postage	0	0	7
To balance due Lieut. <i>Walsh</i> , and paid you 14th Feb. 1804	138	17	6
	£165	7	5

1803.	£	s.	d.	£	s.	d.
Dec. 3. By balance						
Bill <i>Petter</i>	150	0	0			
Commission	3	15	0			
				146	5	0
21, Bypoundage						
of slops per ditto	27	16	2			
Debt 6l. 6s. 3d.						
Fee 1l. 13s. 6d.				8	13	9
Commission 14s.						
				19	2	5
				£165	7	5

And in *May*, 1804, the defendants made out and delivered the following account to Lieut. *Walsh*, and paid him the balance, 95l. 18s. 6d.

1804.	£	s.	d.
To fees passing accounts			
<i>Petter</i>	11	0	6
To trouble for ditto	15	15	0
May 19, To paid you	95	18	0
	£122	14	0

1804.	£	s.	d.
April 18th. By pay and servants			
per <i>Petter</i> 11th Sept. 1796,			
24th May 1801	528	10	4
392l. 12s. 3d. drawn,			
Commission 13l. 4s. 6d. }	405	16	9
	£122	14	0

The sum of 392*l.* 12*s.* 3*d.* above mentioned, was all drawn before the execution of the power of attorney to the defendants, namely, between the year 1796 and the 24th of May, 1801, and includes the 82*l.* 13*s.* received by Mr. Lawson. The whole which the defendants received was 135*l.* 18*s.* 1*d.*, which they received on the 24th of May, 1804, under the power of attorney. Since the Act 35 Geo. 3. c. 94. a lieutenant is entitled to draw every three months, and the agent only receives the balance which may remain due after deducting the drafts, and which the lieutenant has it in his power to reduce to a sum of little more than 10*l.* This account is made out by the clerks in the pay-office, and not by the agent; but it is *the business of the agent to examine such account, to see that it corresponds* with the drafts produced by the clerk, and that the balance is rightly struck: and the defendants did so on the present occasion, and also passed all Lieut. Walsh's accounts for the whole period in which the pay of 528*l.* 10*s.* 4*d.* accrued; and it has been the general practice with the money agents to charge commission on the whole of the amount, and not on the balance which may remain to be received after deducting the sums drawn for. The commander of a gun-brig acts also as purser, and as such, has accounts to make up and pass; and when passed, he is not unfrequently found deficient in those accounts, and in debt to government; in which case the balance of his pay is stopped, and there is nothing for the agent to receive. The question for the opinion of the Court was, Whether the defendants had incurred the penalty of 50*l.* by taking or demanding the money above mentioned?

Wigley, for the plaintiff, contended, That the words of the Act 31 Geo. 2. c. 10. s. 30. (a) were decisive, which confine the

1805.

WALSH
against
TOULMIN.

[544]

(a) By st. 31 Geo. 2. c. 20. s. 30. (on which this action was founded) "to prevent extortion by persons employed in the receiving of seamen's wages and other monies, be it enacted, That no person or persons whatsoever, who shall be employed in the receiving of any wages, pay, prize-money, or any other monies, due or becoming due for or upon account of the service of any officer, seaman, or other person in the royal navy, shall be entitled to take or retain more than 6*d.* in the pound for or upon account of receiving thereof, and for paying the same to the person or persons by whom he or they shall be employed, or according to the direction and appointment of such person or persons, and for all his and their trouble and attendance in relation thereto: and if any person or persons so employed shall directly or indirectly demand, take, or retain, or cause, &c. to be demanded, &c. any allowance, gratuity, reward, or valuable consideration, exceeding in the whole

[545]

1805.
 WALSH
 against
 TOULMIN.

the gratuity to the money received and paid over by the navy agent to his employer; according to which, commission could only be taken upon 135*l.* 18*s.* 1*d.* and not upon the whole account paid; besides which, there is a charge of 15*l.* 15*s.* for *trouble* in passing the accounts of the *Peller*; when the Act directs that the commission to be taken shall include charges for all *trouble and attendance* in receiving and paying over the monies; and this last-mentioned sum was claimed and taken by the defendants on their own account. All the sums too were drawn for in the time of *Lawson* before the defendants became agents, and yet commission is charged on it by them; but, it will be said that the provision of the former Act was repealed by the stat. 35 *Geo.* 3. c. 94. which enables naval officers to draw for their pay: but it only operates incidentally to lessen the amount of the fund upon which the navy agent's commission was payable, by enabling the officers to receive so much of their pay themselves; leaving the commission upon such pay as the navy agent receives and pays over, upon the overcharge of which the penalty attaches. The mode of keeping the account of bills drawn on the navy-office is regulated by *s.* 15 and 17. The bills so drawn are to be examined by the commissioners of the navy, and the account current to be kept and made up by them, so that the agent has nothing to do but to receive the balance; and by *s.* 28. the sums drawn for are to be paid to the drawees *without any deduction or abatement* under any pretence whatsoever, under a penalty of 20*l.* There is nothing to prevent officers of the navy from settling their own accounts and receiving the money themselves which is due to them; in which case it could not be pretended that any commission would be due.

[546]

Lawes, contrà. The stat. 31 *Geo.* 2. does not extend to officers of the description of Lieut. *Walsh*, but only to non-commissioned officers and seamen. The title of the Act is, "For the Encouragement of *Seamen*," and "for the Punctual Payment of *their Wages*," &c. The preamble speaks of "*inferior officers and seamen*," with reference to the latter object: and in no clause are commissioned officers

whole 6*d.* in the pound for the monies so received as aforesaid, every such person shall for every such offence forfeit 50*l.*" &c.

mentioned;

mentioned; but *inferior* officers are mentioned in the 4th, 7th, 8th, 9th, 10, 11th, and 13th sections, &c.; in which latter the form of the order for payment of wages is adapted to *inferior* officers. It is true that the word *inferior* is not in the clause in question, the 30th; but it must be understood with reference to the pay of such *officers* as are spoken of in the other clauses; and was meant to protect those officers and seamen who have not the same power of protecting themselves which superior officers have. [*Le Blanc, J.* The 24th section makes the personating of *any* officer, seaman, or other person entitled to wages, &c. a capital felony.] [Lord *Ellenborough, C. J.* In the clause in question, the expression is "*any officer* (generally) seaman, or other person," omitting the qualification of *inferior* (officer) which is added in other clauses.] At any rate, the stat. 35 Geo. 3. c. 94. which makes special provision for the payment of the wages of commissioned officers, must operate as a repeal of the former Act with respect to them; besides, the declaration charges that the defendants demanded and retained 13*l.* 4*s.* 6*d.* for receiving 135*l.* 18*s.* 1*d.*; whereas it was demanded and retained on account of receiving 528*l.* 10*s.* 4*d.*; there is, therefore, a variance between the counts and the evidence. The account too is not charged to be made out colourably; therefore, though the defendants may still be liable to an action for money had and received, if they have taken more than the Act allows; yet, if it be a mistake, they will not be liable for this penalty, which was given to prevent *extortion*. If one mistakenly receive more interest upon an account than he was entitled to, that would not constitute usury.

LORD ELLENBOROUGH, C. J. The Legislature meant that agents of this description should be put upon their guard; and, therefore, forbids them at their peril to take more than 6*d.* in the pound for or upon account of receiving any wages, &c. of *any officer*, seaman, or other person in the royal navy, and for paying the same to the person by whom they shall be employed, and for all his and their trouble and attendance in relation thereto. The object of the Legislature in this provision was to guard the most thoughtless of men from imposition, by a plain and positive rule. The case of usury is quite different; there the essence of the offence is the

1805.

WALSH
against
TOULMIN.

[547].

1805.
 —
 WALSH
against
 TOULMIN.

[548]

the corrupt contract. The only difficulty which I had in this case was, as to the word *officer*, whether it extended to other than *inferior* officers, to which some of the clauses are confined ; but I think it cannot be confined to petty officers. The words “any officer” are more general; and the expression is not confined to the 30th clause alone; *officers* are mentioned in general terms in the 24th section against personating, &c. If the Act of the 35 Geo. 3, makes it not an object to navy agents to take the trouble of receiving an officer’s pay, they are not bound to do so; but if they will, they must not take more than 6*d.* in the pound upon what they receive.

GROSE, J. of the same opinion.

LAWRENCE, J. If the expression of “*any officer*” in the 30th section meant only inferior officers, it would leave other officers without any protection in this respect; and the 24th section shews that the word officers when used generally, without the qualification of “inferior” (officers) which is added in other parts of the Act, was meant to extend to all other as well as to inferior officers. Then the fact clearly appears, that for 135*l.* 18*s.* 1*d.* stated in the case to have been the whole which was received by the defendants, they have retained 13*l.* 4*s.* 6*d.* as if they had received 528*l.* 10*s.* 4*d.*

LÆ BLANC, J. also relied on the expression of the 24th clause in aid of the 30th clause, and said that personating a lieutenant would be a personating of an officer within the former clause. That here the defendants had charged commission on 528*l.* 10*s.* 4*d.* which they had neither received nor paid over,

Postea to the plaintiff.

1805.

PERRY against FISHER.

Thursday,
June 27th.

UPON a rule for setting aside the judgment for irregularity, it appears that the declaration in *debt* was delivered on the 11th of *May*, and the rule to plead given on the day before; and no rule to plead was given afterwards; which was admitted to be irregular; but after the 11th, a plea of *non assumpsit* was entered; on which the Plaintiff afterwards signed judgment as for want of a plea: and it was holden upon the authority of *Lockhart v. Mackreth* (a) that though the plea of *non assumpsit* to an action of debt were a nullity, yet it was a waiver of the want of a regular rule to plead, and would enable the plaintiff to sign judgment as for want of a plea; but because it appeared upon the affidavits that the plea of *non assumpsit* had been entered without authority by a new attorney without any order for changing the attorney in the cause,

The Court made the

Rule absolute.

Manley, in support of the rule, and *Marryat* *contra*.

(a) 5 Term Rep. 661.

The irregularity of giving a rule to plead before the delivery of the declaration is waived by putting in any plea though a nullity; but such inoperative plea having been put in without authority by a new attorney for the defendant without any order to change the attorney, the judgment which had been signed as for want of a plea, was set aside.

WILLOUGHBY against SWINTON.

[550]

Thursday,
June 27th.

A RULE called upon the Plaintiff to shew cause why the writ of *feri facias* issued in this cause, and all subsequent proceedings, should not be set aside on payment of costs, and 53*l.* 6*s.* paid to the sheriff under the writ, be restored to the defendant, &c. The Defendant gave a bond, dated the 30th *May* 1801, to the plaintiff, in the penal sum of 1080*l.* conditioned for the payment of 494*l.* 4*s.* 5*d.* by yearly instalments of 50*l.* each; and the condition concluded in the common form, that if default should be made in the payment of any of the instalments, the bond should be in full force. At the same time the plaintiff gave the following

A bond, conditioned for the payment of a certain sum by instalments, is within the stat. 8 & 9 W. 3. c. 11. s. 8.; and after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot

sue out execution for it, though within a year after such judgment, without first suing out a *scire facias* to revive it.

written

1805. written memorandum to the defendant, signed by him and attested by the witnesses to the bond:—

WILLOUGHBY
against
SWINTON.

[551]

“ Memorandum. Whereas *A. D. Swinton* (the defendant) hath this day given and executed to me a bond in the penal sum of 1080*l.* conditioned for the payment of 494*l.* 4*s.* 5*d.* by instalments, at the rate of 50*l.* a year; now, I do hereby declare, that nothing in the said bond contained shall authorize me to proceed upon any default of payment for any sum which shall not have become actually due at the time, nor tend in any manner to accelerate any of the other payments mentioned in the said bond, or the condition thereof; as witness,” &c. After payment of part of the instalments, the defendant was arrested in *Michaelmas* Term last in an action of debt for the whole penalty, but was only holden to bail for 75*l.* then due on the bond; to which he pleaded that the bond was obtained by covin; and on issue joined, the plaintiff obtained a verdict without defence, and had judgment as of last *Hilary* Term; and in *Easter* Term the costs were taxed at 61*l.* which, together with 80*l.* 5*s.* 6*d.* the amount of the instalments, and interest due thereon, were paid to the plaintiff's attorney. On the 1st of *June* last, a further instalment of 50*l.* became due, for which the plaintiff afterwards issued the present writ of *fieri facias*, returnable in *Trinity* Term, grounded on the same judgment, and made the levy in question: which writ is for 1080*l.* and also 61*l.* damages, and indorsed to levy 50*l.* and interest from the 1st of *June*, together with the sheriff's poundage, &c.: and under this writ 53*l.* 6*s.* has been paid.

Parnter shewed cause against the rule, and contended, that it was not necessary to sue out a *scire facias* to revive the judgment in this case, in order to warrant the levy for the subsequent instalment; but that the judgment stood as a security for the remaining instalments as they became due, with a stay of execution which might be taken out at any time within a year after each default, without a *scire facias*: and that such was recognized to be the practice, (a) founded upon decided cases; *Bridges*, v. *Williamson*, (b) *Darby* v. *Wilkins*, (c) *Masfen* v. *Touchet*, (d) and particularly *Gowlett* v. *Hanforth*, (e) which turned on the construc-

(a) 2 Tidd's Pract. 1037.

(b) 2 Stra. 811.

(c) Ib. 957.

(d) 2 Blac. Rep. 706, and vide 2 Atk. 118.

(e) 2 Blac. Rep. 958.

tion of the stat. 8 and 9 W. 3. c. 11. s. 8; and *Ogilvie v. Foley*. (a) The stat. of King *William*, which directs that in all actions on bonds for non-performance of any covenants or agreements, the plaintiff may assign breaches, and the jury shall assess damages, &c. (b) relates not to cases of bonds conditioned for payment of certain sums by instalments, but only to cases where the damages being unliquidated, the intervention of a jury was necessary to ascertain them. The only excepted case is that of an annuity, as in *Collins v. Collins*, (c) which turned, however, upon the statute of set-off (8 Geo. 2. c. 24. s. 5.) and was prior to the cases in *Black. Reports*, which have settled the practice in cases of bonds conditioned for payment of sums certain by instalments.

1805.
WILLOUGHBY
against
SWINTON.
[552]

Marryat, in support of the rule, after observing, That there was no provision here for a stay of execution, according to the practice referred to in the cases cited, contended that the case of a bond conditioned for the payment of money by instalments was in no respect distinguishable from that of an annuity-bond, and must, therefore, be governed by the authority of *Collins v. Collins*, which had

[553]

(a) 2 Blac. Rep. 1111. sed Vide *Howel v. Hanforth*, 2 Blac. Rep. 843, and 1016.

(b) That statute enacts, "That in all cases upon bond, &c. for non-performance of any covenants or agreements in any deed, &c. the plaintiff may * assign as many breaches as he thinks fit, and the jury shall and may assess not only such damages and costs as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered as heretofore," &c. Then, after providing for the payment of so much as shall be then found to be due, and staying execution of the judgment as to residue, it proceeds to enact that "such judgments remain as a further security to answer to the plaintiff such damages as shall or may be sustained for further breach of any covenant in the same deed, &c. upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, &c. suggesting other breaches of the said covenants or agreements, and to summon him to shew cause why execution should not be awarded upon the said judgment; upon which there shall be the like proceeding as was in the action of debt upon the said bond for assessing of damages upon trial of issues joined upon such breaches, &c.; and *toties quoties*," &c.

* The statute is compulsory on the plaintiff to assign breaches. *Rules v. Rosewell*, 5 Term Rep. 538, and *Hardy v. Bern*, *ibid.* 636.

(c) 2 Burr. 320. The opinion of the Court was also given upon the stat. 8 and 9 W. 3. c. 11. s. 8.

1805.
 WILLOUGHBY
 against
 SWINTON.

been acted upon since (a) the cases in *Blackstone's Reports*, when the rule had been more accurately considered. He was then proceeding to draw in aid of the defendant the memorandum, whereby the plaintiff stipulated not to proceed upon the bond for any default of payment beyond what was actually due at the time: but the Court intimated that that did not carry the matter further than the law itself would direct.

LORD ELLENBOROUGH, C. J. The opinion of the Court in the case of *Collins v. Collins* (b) has entirely decided the present question; for when it was considered that in the case of an annuity execution could not be sued out for arrears accruing subsequent to the judgment, without a *scire facias*, as required by the stat. 8 and 9 W. 3. c. 11. s. 8., it decided the present question; for there can be no difference between a bond to secure an annuity for life, and a bond to secure a certain number of annual payments for so many years: the same reason must govern both cases; and I believe the practice has generally conformed to it: and there is this convenience in it, that if the obligee has made subsequent payments on account, he may plead that to the *scire facias*, and thereby secure himself from further injury.

[554] GROSE, J. declared himself of the same opinion.

LAWRENCE, J. This is not distinguishable in principle from the case of *Collins v. Collins*: nor does it differ otherwise than that this is a bond for a *debt* payable by instalments, which was there admitted to be within the statutes of King *William* and *Geo.* 2. though the case of an annuity-bond was contended not to be within them; but a bond for securing an annuity for life was there decided to be within those statutes; and this is the same thing: for, What is an annuity-bond but a bond for securing certain sums payable at certain times during the life of the party? and this bond is for securing certain sums at certain times for a limited period. It is also a bond for the performance of an agreement in writing; and, therefore, comes expressly within

(a) Vide *Walcot v. Goulding*, 8 Term Rep. 126.; where it was expressly decided that after judgment for the plaintiff on demurrer in debt on bond conditioned for payment of an annuity, the defendant could not take out execution for the arrears due, but was obliged to assign breaches on the record under the stat. 8 and 9 W. 3. c. 11. s. 8.

(b) 2 Burr. 820.

the words of the stat. 8 & 9 *W. 3.* The case then of the annuity-bond is so very similar to the present, that after that decision I cannot say that this case does not come within the statute of King *William*.

1805.

WILLOUGHBY
against
SWINTON.

LE BLANC, J. Since it has been decided that an annuity-bond is within the statute of King *William*, it is impossible to distinguish it from the present case, and to say that this does not fall within the same principle: but I cannot help thinking that it is a severe measure of justice against creditors, to oblige a creditor who has consented to waive the enforcing of his whole demand at the time, upon condition that he shall receive his debt by instalments at certain periods, to bring a fresh action for every instalment which is due: but it having been so decided in the case of an annuity-bond, I cannot say that this case must not be governed by it.

Rule absolute.

MARTIN and Others against SMITH.

[555]

Friday,
June 28th.

IN *assumpsit* against the vendee of land, for not performing his agreement to purchase on certain terms, the first count of the declaration stated, That whereas the Plaintiffs on the 10th of *March*, 1804, were *seised in their demesne as of fee* of and in certain lands, &c. in the parish of *Bluntisham*, in the county of *Hants*; and being so seised, caused *P. C. &c.* auctioneers, to sell by auction the said lands, &c. subject to certain conditions of sale, *viz. (inter alia)* 1st, That the highest bidder should be the purchaser; 3d, That the purchaser should pay down immediately a deposit of 20*l.* per cent. in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 24th of *June*, 1804, *on having a good title*; 4th, That the purchaser should have proper conveyances, together, and that he, the plaintiff, had been always ready and willing, and offered to convey the lands to the defendant, but that the defendant did not pay the purchase-money: and, on demurrer, held that such general allegations of title in the plaintiff, and that his title was made good and satisfactory to the defendant, and that the plaintiff was ready and willing, and offered to convey to the defendant, were tantamount to a performance of the agreement on his part so as to entitle him to recover for a breach of the defendant's part, in not paying the purchase-money.

In *assumpsit* by the vendor against the vendee of land for not accepting it and paying the purchase-money, the plaintiff averred that he was seised in fee of the land, and that the defendant agreed to purchase it on having a good title, and that his title to the land was made good, perfect, and satisfactory to the de-

1805.

MARTIN
against
SMITH.

[556]

ther with such attested copies as might be thought necessary, at his own expence, on payment of the remainder of the purchase-money, conformably to the third condition, &c.; and lastly, That should the purchaser fail to comply with these conditions, the deposit-money should be forfeited, and the vendors be at liberty to resell the estate; and the deficiency, if any, together with all charges, should be made good by the defaulter, &c.; and whereas the defendant attended at the sale, and was the highest bidder and purchaser of, and did at such sale accordingly purchase certain of the said lands, &c. viz. a parcel of freehold woodland, called *Bluntisham Low Wood*, &c. in the parish of *Bluntisham*, in the said county, for 1500*l.*; and thereupon, in consideration that the plaintiffs at the request of the defendant had promised the defendant to perform the conditions of sale on their parts as sellers, &c. the defendant promised the plaintiffs to perform the said conditions of sale on his part as the purchaser, &c. The count then alleged, that the defendant, in part performance of the said conditions of sale and of his promise, &c. made a deposit of 300*l.* at the sale, in part of the purchase-money, and signed an agreement that he would comply with all the other conditions, &c.; and then the plaintiffs averred, That though after the sale, and the promise of the defendant, and before the 24th of *June*, 1804, in the said conditions mentioned, “ the title to the said lands, &c. was made good and perfect, and satisfactory to the defendant, according to the said conditions of sale as aforesaid; and that they have always from the time of the said sale and the said promise, &c. hitherto been ready and willing,” and afterwards, to wit, on, &c. “ offered to convey the said lands, &c. to the defendant, according to the said conditions of sale,” and have been always ready and willing to do and perform all things on their parts to be done and performed according to their said promise, &c.; and of all which premises the defendant had due notice; nevertheless the defendant, not regarding his said promise, &c. did not on or before the said 24th of *June*, 1804, nor at any other time whatsoever, pay to the plaintiffs the said 1200*l.* the residue of the said 1500*l.* the purchase-money, &c. in violation of his promise, &c. There were two other special counts, which it was admitted on the argument could not be supported;

supported; and there were also common money counts. To the first special count the defendant pleaded, That though after the sale and before the 24th of *June*, 1804, viz. on the 1st of *June*, &c. he requested the plaintiffs to deliver to him a good and sufficient abstract of their title to the lands mentioned to have been purchased by him; yet the plaintiffs did not, nor would, when requested as aforesaid, nor at any time before or afterwards, deliver to the defendant such good and sufficient abstract, but wholly refused, &c. and therein made default. To the 2d and 3d special counts, there were special demurrers, shewing for cause principally, that it did not appear by those counts what estate, title, or interest the plaintiffs had in the premises; and to the common counts the defendant pleaded *non assumpsit*. Replication to the plea to the first count, that the plaintiffs did not refuse and neglect to deliver such good and sufficient abstract as in the said plea is mentioned, when requested by the defendant in manner and form as he has alleged. To which there was a demurrer, assigning for special causes, 1st, That the plaintiffs ought in their replication to have alleged that they did deliver to the defendant a good and sufficient abstract of a good and sufficient title to the lands in question, and to have shewn therein what estate, title, or interest they had in the lands. 2dly, That the plaintiffs have by their replication attempted to put in issue a negative allegation, when, by the rules of pleading, the issue ought to be upon some affirmative matter, viz. Whether or not the defendant requested the plaintiffs to deliver to him an abstract as in the first plea mentioned? or, Whether or not the plaintiffs did comply with such request? 3dly, That the plaintiffs have attempted by their replication to put in issue two facts;—the one, Whether or not the defendant made the request in his first plea mentioned? the other, Whether or not the plaintiffs complied with the said request? &c. It was admitted, that the plea to the first count and the replication to such plea, were both bad; and the question turned wholly on the sufficiency of the first count.

Symonds, in support of the demurrer, objected to that count, That it was not sufficient to aver in general that they were seised in fee; and that their “title to the land was made

1805.

 MARTIN
 against
 SMITH.

[557]

[558]

1805.
 ———
 MARTIN
 against
 SMITH.

made good, perfect, and satisfactory to the defendant," and that they "were always ready and willing to convey;" but they should have set forth what their title was, in order that the Court might see whether it were valid in law, and should have pleaded a tender of the conveyance; and he cited *Reynoldson v. Blake*, (a) where, in *quare impedit*, for hindering the plaintiffs from presenting to a church an averment that Sir T. Gouge, from whom they claimed, was the true patron thereof, was deemed insufficient, without shewing how he was patron; also, *The Duke of St. Albans v. Shore*, (b) where in debt for a penalty against one who had articked to purchase land, one objection was, that the plaintiff only stated that he was "ready and willing to make a good title," but did not shew what title; which Lord Loughborough, C. J. in delivering the judgment thought was material, and that the plaintiff ought to have exhibited his title; also *Phillips v. Fielding*, (c) where the purchaser of a copyhold had agreed to make a deposit, and to pay the remainder of the purchase-money at a certain time, on having a good title, and a proper surrender made to him; and in an action by the seller for the non-performance of the conditions on the part of the purchaser, wherein the seller alleged "That he had been always ready and willing, and frequently offered to make a good title to the estate, and to make a proper surrender of it on payment of the purchase-money," it was holden not to be sufficient, but that he ought to have averred that he actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal; and ought also to have shewn what title he had; and in *Glazebrook v. Woodrow*, (d) where the plaintiff covenanted to sell to the defendant a school-house, and to convey the same to him by a certain day, in consideration whereof the defendant covenanted to pay the plaintiff a certain sum on or before the day; it was determined that the conveyance and the payment of the money were concurrent acts, and the covenants dependent on each other; and that the seller could not recover the money without averring that he had conveyed, or tendered a conveyance to the purchaser.

[559]

(a) 1 Id. Ray. 192. (b) 1 II. Blac. 270-5, 280. (c) 2 H. Blac. 123.
 (d) 3 Term Rep. 366, all the prior cases are collected in Mr. Serjt. Williams's Note (3) to *Portage v. Cole*, 1 Saund. 320.

Donaldson, contrò, contended, That the averments of the plaintiff's seisin in fee of the estate, and that the title to it was made good, and perfect, and satisfactory to the defendant, were sufficient averments of title, and a sufficient compliance with the conditions of the sale to make a good title to the purchaser, to entitle the plaintiff to recover without setting forth the title particularly; and that admitting that the making a good title by the plaintiff and payment of the purchase-money by the defendant were concurrent acts, the averment that the plaintiff had always been ready and willing, and had offered to convey the estate to the defendant according to the conditions of sale, was sufficient to entitle him to recover in this action without averring an actual tender of the conveyance. He observed, that however strict the rule of pleading might formerly have been in requiring the party who averred title in himself to shew what his title was, yet, that strictness had long been laid aside in practice in actions upon contracts like the present, on account of the manifest inconvenience of it; and he distinguished this from the cases cited, by shewing that the averment here went much further than in those. The case of *The Duke of St. Albans v. Shore* (a) was decided upon a different ground; for there the plaintiff by his own act had rendered himself incapable of performing his part of the contract, by having cut down the timber which was to have gone with the estate stipulated to be conveyed to the defendant; and in *Phillips v. Fielding* (b) there was no averment that the plaintiffs had a good title, but only that he had been always ready and willing, and had frequently offered to make out a good title to the estate, and to make a proper surrender of it to the defendant, on payment of the purchase-money: whereas here the plaintiff avers not only that he was seised in fee of the estate, but that his "title was made good, perfect, and satisfactory to the defendant, according to the conditions of sale." Then, if there be a sufficient averment of title, the allegations that the plaintiffs "have always from the time of the sale hitherto been ready and willing," and that they "offered to convey the lands to the defendant," &c. are sufficient without an actual tender of the convey-

1805.

MARTIN.
against
SMITH,

[560]

(a) 1 H. Blac. 270.

(b) 2 H. Blac. 123.

1805. **MARTIN**
against
SMITH. ance, according to the last-decided cases on this subject, *Rawson v. Johnson*, (a) and *Waterhouse v. Skinner*, (b) wherein the prior authorities (c) were considered; the agreement to make a good title and convey, on the one hand, and to pay the purchase-money, on the other, being concurrent and dependant contracts. [Lord *Ellenborough* observed, that the defendant's counsel had laid no stress on this objection.]

[561] *Symonds*, in reply, relied principally on *Phillips v. Fielding*, as having been expressly decided on the ground that the abstract of the seller's title ought to have been set forth in the declaration.

Lord ELLENBOROUGH, C. J. It is too much to contend for, that it is necessary for a party alleging title in all cases to display his whole title on the record. In many instances, title is put in issue generally; (d) in a writ of right the mise is joined on the mere right; in a dower the issue is, that the party *ne unques seisie que dower*; (e) though how a person is seised may involve important questions at law; it may be in fee, or in tail, or it may be by wrong; but these questions are not displayed upon the record. It seems indeed to have been considered by the noble Judge, whose opinions in *The Duke of St. Albans v. Shore*, and in *Phillips v. Fielding*, [562] have been quoted, that it was necessary for the plaintiff to

(a) 1 East, 203.

(b) 2 Bos. & Pull. 447.

(c) *Morton v. Lamb*, 7 Term Rep. 125, and other cases there cited.

(d) Vide Sir Francis Leke's case, Dy. 365, a; where, in replevin, on the question, Who ought to keep the inclosure? the avowant stated that he was seised in fee; and the Court held, that though he need not have shewn any precise estate, but generally that he was seised of the close; yet having done so, the precise estate was traversable. Viner assigns this reason why in such a case the party need not have shewn of what estate he was seised, because, touching this matter his estate was not material. 19 Vin. Abr. 317, tit. Seisin. Pleadings.

(e) In Co. Entr. 176, a, the plea of the tenant is "Quod prædicta Margareta dotem suam de tenementis prædictis, &c. ex dotatione prædicti Andreæ quondam viri sui habere non debet, quia dicit quod prædictus A. &c. nec diu quo ipse prædictam Margaretam desponsavit nec unquam postea fuit seisitus de tenementis prædictis unde, &c. de tali statu, ita quod eandem Margaretam inde dotasse potuit," &c.

Vide 5 Com. Dig. 242, tit. Pleader (2 Y. 7), Clift. 303, and 9 Vin. Abr. 279, &c. tit. Dower, Pleadings; and vide *Beaumont v. Dean*, 2 Leou. 10; where in dower the defendant pleaded, that before the writ brought he assigned a rent of 10l. per annum to the demandant, in recompence of her dower: on which the demandant demurred, because the tenant had not shewn what estate he had in the lands at the time of the rent granted, as to say that he was seised in fee and granted the said rent; so that it might appear to the Court upon the plea that the tenant had a lawful power to grant such a rent; which was granted by the whole Court, and the demurrer allowed.

set forth the abstract of his title specially; but I am not convinced that that is necessary. At any rate, however, the question here is, Whether sufficient has not been set forth by the plaintiffs to enable them to call upon the defendant for the non-execution of his part of the agreement, when, besides averring themselves to be seised in fee, (a) they allege that their title to the lands in question was made good, perfect, and satisfactory to the defendant. If made satisfactory to the defendant, what further can the plaintiffs be called upon to do? it is all that can be expected of them. This averment therefore removes any difficulty which might arise from the cases in the Common Pleas; from which cases the present is distinguishable.

GROSE, J. There would be great inconvenience if in such a case as this it would be necessary for a plaintiff to set forth all the particulars of his title in the declaration. It stands admitted that the plaintiffs are seised in fee, and that their title to the land was made "good, perfect, and satisfactory to the defendant;" and what more can be required?

LAWRENCE, J. I cannot find any printed precedents of this sort of action by a vendor against a vendee of an estate for not accepting the title and paying the purchase-money. I have manuscript precedents like the present; but those I do not rely upon in the consideration of the question. The opinion delivered by Lord *Loughborough* upon this point in *The Duke of St. Albans v. Shore*, I collected at the time to be merely his own, and not that of the other Judges. And as to the case of *Phillips v. Fielding*, it does not appear to me to be so exactly like the present as is supposed: there were no such averments there as are in this declaration, that the plaintiffs were seised in fee, and that their title was made good and satisfactory to the defendant.

LE BLANC, J. This is distinguishable from the case of *Phillips v. Fielding*, which has been most relied on in the two particulars mentioned; that the plaintiffs were seised in fee, and that their title was made out good and satisfactory to the defendant. I do not see what else was to be stated:

1805.

MARTIN
against
SMITH.

[563]

(a) In *Meriton v. Benn*, 2 Lutw. 1343, the rule given is, That where a seisin in fee is alleged, it must be intended a legal seisin, till the contrary be shewn.

1905.

MARTIN
against
SMITH,

any thing beyond this is merely evidence of title ; which cannot be necessary to be stated.

Lord ELLENBOROUGH, C. J. then said, that the Court would give judgment *nisi*, &c. for the plaintiffs ; and if any doubt occurred to them during the Term, they would mention it ; if not, the judgment would stand. And no further mention of the case being made, there was

Judgment for the Plaintiffs.

[564]

Monday,
July 1st.

CLARKE against GRAY and Others.

MARSDEN against GRAY and Others.

In declaring upon a contract, not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the act, & the entire act or duty which is to be done (including the time, manner, and other circumstances of its performance) in virtue of such consideration ; the breach of which act or duty is complained of ; but such part of the contract which respects only the liquidation of damages after a right to them has accrued by a breach of the contract is not necessary to be set forth in the declaration, but is only matter of evidence to be given to the jury in reduction of damages. Therefore *assumpsit* may be maintained in the common form of declaring against a carrier for the loss of goods, which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the carrier would not be accountable for more than 5*l.* for goods, unless entered as such, and paid for accordingly.

THESE were actions of *assumpsit*, in the common form, against common carriers, which were tried so long ago as the sittings after *Easter Term*, 1802, when a verdict for 5*l.* was taken in each, subject to be set aside and nonsuits entered, if the Court should be of opinion that the plaintiffs had not declared properly ; and rules *nisi* were obtained for that purpose in *Trinity Term*, 1802 ; and the cases were then shortly argued ; the plaintiffs' counsel endeavouring to distinguish them from *Yate v. Willan*, 2 *East*, 128, or otherwise questioning the general opinion there delivered. The cases stood over for the opinion of the Court till the beginning of this term, when Lord *Ellenborough*, C. J. said, that as Mr. Justice *Grose* was not in court at the former argument, and as the Court entertained some doubt upon the question, they wish to have it argued again ; which was accordingly done on a former day in the course of the term by *Marryat* for the Plaintiffs, and *Holroyd* for the Defendants ; but as the principal arguments and authorities cited were fully stated by the Court in the judgment afterwards delivered, they are omitted here to avoid repetition. The only other cases not again noticed, which were mentioned at the conclusion of the argument, touching covenants

secured

secured by penalties, where the party had his option either to declare for the penalty, and forego the general covenant, or to forego the penalty and declare generally for the breach of * covenant, and thereon recover more or less than the penalty according to the damage sustained, where *Lowe v. Peers*, 4 Burr. 2228. *White v. Sealy*, Dougl. 49. *Kerwin v. Blake*, 14 Vin. Abr. 460, tit. Interest (E. 4.), and in *Dom. Proc.* 2 Bro. P. C. 333. *Lord Lonsdale v. Church*, 2 Term Rep. 388. *Tew v. The Earl of Winterton*, 3 Bro. Ch. Cas. 489. *Knight v. Maclean*, ib. 496, and *Wilde v. Clarkson*, 6 Term Rep. 303: and a distinction was taken between simple bonds for the payment of money, where no more than the penalty could be recovered in damages; and collateral covenants for performance or payment generally, upon which the damages were only limited by the loss or injury sustained.

LORD ELLENBOROUGH, C. J. on this day delivered the judgment of the Court. This was an action of *assumpsit*, brought against the defendants as proprietors of the *True Briton* stage coach, from *London* to *Market-Harborough*, to recover the value of goods belonging to the plaintiff, and sent with the plaintiff's wife as a passenger in that coach, and lost in the course of their conveyance. The declaration was in the usual form, against carriers for losses by negligence. The loss was admitted. On the part of the defendants it was given in evidence that they had for 12 or 14 years past given notice by a board on their coach-office, hanging up over the place where the book-keeper sat, and where places for the coach were taken, parcels received, &c. as follows: "Take notice, that no more than 5*l.* will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly." The goods lost were admitted to be above the value of 5*l.*; and a verdict was taken for the plaintiff, subject to the question, Whether the special contract created by the terms of this notice, and by which the responsibility of the carriers was limited, so as not to exceed the sum of 5*l.* unless where goods were entered and paid for as of an higher value, should have been stated in the declaration. It was contended on the authority of *Yate v. Willan*, 2 East, 128, that it should have been so stated. In that case there had existed in point of fact a similar notice

1805.

CLARKE
against
GRAY
and Others,
[565]

[566]

1805.

CLARKE
against
GRAY
and Others.

notice with the present, but it had not been stated in the declaration; which was framed as for a loss by negligence in the conveyance of the goods generally, in a manner similar to the present declaration; but the 5*l.* having been in that case paid into Court, the defendant was holden to have thereby admitted the contract to be as there laid; and the plaintiff's right therefore to recover the full value of the goods (not restrained by the notice which was holden to be excluded from the contract by the effect of paying money into Court, which admitted the contract to be as stated in the declaration) was sustained. The present case having been argued some time ago, when my Brother *Grose* was absent, and the rest of the Court upon that argument, and a subsequent consideration of the subject, entertaining considerable doubts, directed it to be argued again this Term, when the Court was full; and it has accordingly been again argued. On the part of the plaintiff it is insisted that the provision "That no more than 5*l.* should be accounted for, unless the goods were entered and paid for accordingly, amounts only to a limitation of the damages to be recovered in the event of a breach of the contract of carriage, and not to a qualification of the contract itself. On the part of the defendants it is insisted, that the provision in question is a limitation of the promise itself, and varies that responsibility for the entire value of the goods which the custom of the realm, or the general undertaking to carry safely, stated in the declaration, would otherwise cast upon the carriers. That it is not to be considered as a distinct independent proviso, but as a term and qualification annexed to and making a part of the original contract of carriage itself. But if the obligation to carry safely do not depend on the question of compensation to be paid in case of loss, but be wholly collateral thereto; and if the contract for safe carriage be equally broken by the loss of the goods, whether the sum stipulated to be paid on that account be much or little, it cannot be said that such stipulation necessarily makes a part of the contract for safe carriage. Indeed, its operation and effect may be considered as only attaching and beginning after the question of safe carriage is at an end, by the breach of the contract made for that purpose. Its proper office is to limit the province of the jury in the assessment of damages

[567]

1805.

 CLARKE
 against
 GRAY
 and Others.

damages for a contract broken, and of course has no concern with it as long as it is executory and in the course of its performance. It resembles, in some degree, the case of a covenant in a lease, not to plough ancient meadow or the like, followed by a proviso, that in case the same should be ploughed by the tenant thereof, he should pay a certain increased rent for the same. In such case it would certainly be in the option of the lessor to declare as for a breach of covenant not to plough, or the lessor may declare at once for a breach of covenant for not paying the stipulated satisfaction for such ploughing. Both the covenant and the proviso in that case form distinct substantive parts of the same lease, as the contract of carriage, and the limitation of the amount of damages to be paid, in case no entry of and payment for the goods have been made, do in this. It is no more necessary to state every part of an agreement, not under seal, each part making a distinct contract, than it is of an agreement under seal: it is sufficient in either case to state so much of each as constitutes that contract, the breach of which complained of prescribes the duty to be performed, and the time, manner, and other circumstances of its performance: with this difference only, that in the case of an agreement not under seal, the consideration must be stated, and no part of the entire consideration for any promise contained in the agreement can be omitted. In the present case, the entire consideration for the promise to carry safely, viz. the delivery of the goods to be carried for a reasonable reward to be therefore paid to the carriers, is stated. This is not like the cases in *Godbolt*, 154, and *Aleyn*, 5, to which we have been referred by the defendant's counsel. Those were cases where the defendant, in consideration of marriage, promised to do *several* things; for the non-performance of *one* of which the plaintiff brought his action, and declared as for a promise to do *one* thing only, without mentioning the other things. In each case the Court was of opinion in favour of the defendant: in the case in *Aleyn* judgment was for the defendant, after a verdict for the plaintiff, "because the plaintiff ought to have set forth the whole promise which is entire:" and in the case in *Godbolt* the question seems to have arisen on the plea of *non assumpsit*, which the Court considered as a good bar; "for (as is there

[568]

1805.
 CLARKE
 against
 GRAY
 and Others.

[569]

there said) the contract being entire, if it be not a good plea, the defendant might be charged for the several things," &c. i. e. in several actions. In that case the marriage, and the several things agreed to be performed on account thereof, were respectively considerations for each other: the several things formed but one entire consideration in the whole for the marriage; and if all of them were not stated, the consideration on the one side would have been untruly, and therefore defectively stated. But here the limitation of the carriers' responsibility is no part of the consideration for their promise to carry safely; the reward agreed to be paid them being the sole consideration for such promise on their part. If the entry of the goods and the payment of a price for the carriage proportioned to their value were a part of the consideration for carriage, the non-entry and non-payment might be pleaded in bar of the action to recover any damages for the loss of the goods: but if this proviso in favour of the carriers, instead of being given in evidence by them on the general issue, had been specially pleaded, it could not have been pleaded as a bar to the action generally, but only as against the plaintiff's recovering more than the sum of 5*l.* on account of the goods being not specially entered and paid for according to their actual value. There are a great variety of agreements not under seal, containing detailed provisions, regulating prices of labour, rates of hire, times, and manner of performance, adjustment of differences, &c. which are every day declared upon in the general form of a count for work and labour: and yet, upon the principle contended for, every provision contained in such agreements, regulating the duties and limiting the responsibility of the parties in particular events, ought to be stated. To what extent this would go, in declaring upon contracts of affreightment in the nature of charter-parties, but not being under seal, builders' contracts, and the like, will readily occur to all persons conversant in the drawing of pleadings at common law. It seems to us, therefore, that it is sufficient to state in the declaration so much of any contract, consisting of several distinct parts, and collateral provisions, as contains "the entire consideration for the act, and the entire act which is to be done in
 virtue

[570]

virtue of such consideration; and that the rest of the contract, which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury in reduction of damages, but not necessary to be shewn to the Court in the first instance on the face of the record. If, indeed, the provision be of such a nature as goes in discharge of the liability of the party under the contract altogether, in case a particular condition is not complied with, as in *Clay v. Willan*, 1 *H. Black.* 298, where the goods were not to be accounted for at all unless properly entered and paid for, that will not merely operate in reduction of the damages, but in bar of the action; and which case therefore appears to have been rightly decided on this ground. For the reasons already given, it appears to us that the case of *Yate v. Willan* cannot be supported in its full extent; for although the payment of money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss, which existed in that case, and exists also in this. We are of opinion, therefore, that in the present case the plaintiff is entitled to retain his verdict for 5*l.* the limited amount of damages recoverable under this contract. The like judgment in *Marsden v. Gray and others*, under similar circumstances,

1805.

 CLARKE
 against
 GRAY
 and Others.

1805.

Monday,
July 1st.

SALVIN and Others against JAMES and LANGSTON.

By a policy under seal referring to certain printed proposals, a fire-office insured the defendants' premises from 11th of Nov. 1802, to 25th Dec. 1803, for a certain premium, which was to be paid yearly on each 25th of Dec. and the insurance was to continue so long as the insured should pay the said premium at the said times, and the office should agree to accept it. And by the printed proposals it was stipulated that the insured should make all future payments annually at the office within 15 days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium were paid. And by a subsequent advertisement (agreed to be taken as part of the policy) the office engaged that all persons insured there by policies for a year or more, had been and should be considered as insured for 15 days beyond the time of the expiration of their policies; yet, held, notwithstanding this latter clause, the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured had refused; that the office was not liable for a loss which had happened within 15 days from the expiration of the year for which the insurance was made; though the assured, after the loss and before the 15 days expired, tendered the full premium which had been demanded. The effect of the whole contract, &c. taken together, being only to give the assured an option to continue the insurance or not during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not before the end of the year, determined the option by giving notice that they would not renew the contract.

IN *assumpsit* the Plaintiffs declared, that at the time of making the promise and insurance, and of the happening of the loss after-mentioned, a society of persons, called the *Sun-Fire-Office*, carried on the business of insuring houses, &c. of which society the defendants and one *C. B.* deceased were then trustees and acting managers; and the defendants still continue, &c.; and that the society made insurances by policies of the substance and effect of that set forth, and referring in the same manner to certain proposals of the society. That the plaintiffs were desirous of causing to be insured in the said office (if the terms of insurance could be agreed upon) by a policy taken out for one year or longer, a cotton mill, &c. of theirs to the amount of 3000*l.* of which the defendants and *C. B.* had notice; and thereupon afterwards, on the 11th of *November*, 1802, in consideration that the plaintiffs would cause their said property to be insured at the office of the society, by a policy taken out for one year, or for a longer time, the defendants and *C. B.* undertook and promised the plaintiffs "that their property should be considered by * the managers of the society as insured for 15 days beyond the time of the expiration of the said intended policy." The plaintiffs then averred, that relying on the said promise and undertaking of the defendants and *C. B.* they did on that day cause their said property to be insured in the said office, by a policy taken out for a longer time than one year in such sum, and did then pay to the society 36*l.* 1*s.* 10*d.* as a premium for the insurance which policy was then executed by the defendants and *C. B.*

being such trustees, &c. The declaration then set forth the policy, which reciting that the plaintiffs had paid 36*l.* 1*s.* 10*d.* to the society, and had agreed to pay at their office 31*l.* 10*s.* on the 25th of *December*, 1803, and the like sum of 31*l.* 10*s.* yearly, on the 25th of *December*, during the continuance of that policy, for insurance from loss by fire on their cotton-mill, &c. not exceeding 3000*l.* stipulated that from the date of the policy, and “as long as the plaintiffs should duly pay the said sum of 31*l.* 10*s.* at the times and place aforesaid, and the trustees, &c. of the said society for the time being should agree to accept the same,” the stock of the society should be liable to pay to the plaintiffs such loss as they should suffer by fire, not exceeding 3000*l.* according to the exact tenure of their printed proposals, dated 1st of *November*, 1804, and of two Acts of Parliament of the 22 & 27 *Geo.* 3, for charging a duty on insurance against loss by fire. In witness whereof the defendants and *C. B.* as three acting trustees, &c. set their hands and seals the 11th of *November*, 1802. Signed and sealed by them, being stamped according to Act of Parliament, &c. Received at the same time, pursuant to the said two Acts, 3*l.* 8*s.* 9*d.* duty on 3000*l.* insured by this policy from 5th of *November*, 1802, to *Christmas*, 1803, &c. It also set forth a certain article, part of the said printed proposals referred to, viz. “on bespeaking policies all persons are to make a deposit for the policy, stamp duty, and mark; and shall pay the premium to the next quarter-day, and from thence for one year more at least; and shall as long as the managers agree to accept the same, make all future payments annually at the said office, within 15 days after the day limited by their respective policies, upon forfeiture of the benefit thereof: and no insurance is to take place till the premium be actually paid by the insured,” &c. It also set forth another article, that “persons insured sustaining any loss by fire, are forthwith to give notice thereof at the office, and as soon as possible afterwards deliver in as particular an account of their loss and damage as the nature of the case will admit of, and make proof of the same by their oath, &c. and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish not concerned in such loss, importing that they are well acquainted with the character and circumstances of

1805.

SALVIN
against
JAMES.

[573]

1805.

SALVIN
against
JAMES.

[574]

the person insured, and do know or verily believe that he really and by misfortune has sustained by such fire the loss to the value mentioned; but till such affidavit and certificate of such the insured's loss shall be made and produced, the loss money shall not be payable," &c. The declaration then contained averments of the state of the premises, and the plaintiff's interest therein; and further, that after the expiration of the said policy, and within 15 days after such expiration, viz. on 7th of *January*, 1804, the said cotton-mill, &c. so insured, without default of the plaintiffs, &c. were destroyed by fire, &c. It then stated that the plaintiffs would have procured a proper certificate, &c. of the loss (as required by the proposals,) but that the managers of the society absolutely refused to consider the said property so insured, as insured by the society at the time of the loss, and discharged the plaintiffs from procuring such certificate, &c. of which the defendants (*C. B.* being then dead) had notice, and were requested to pay the insurance money according to their promise, but have refused to pay, &c. The second count stated the contract to be, that in consideration that the plaintiffs would cause their said property to be insured at the office of the society by a policy taken out for one year, or for a longer term, and would pay within 15 days after the expiration thereof, such premium as should then be payable to the society for the renewal thereof for another year, the defendants and *C. B.* as such trustees and acting managers, promised the plaintiffs that their said property should be considered by the managers of the society as insured for 5 days beyond the expiration of the policy, unless the society previous to any loss by fire should have refused to accept such premium last aforesaid, or renew the policy. The count then averred, as before, a loss by fire within 15 days after the expiration of the policy, and also averred that the plaintiffs afterwards, and within the 15 days after, &c. tendered to the society the premium then payable for the renewal of the policy for another year, amounting to 57*l.* and also the duty payable on the same insurance, but the society then refused to accept the same,—the society not having previously to the loss refused to accept the last-mentioned premium, or to renew the policy. The third count laid it to be, that in consideration that the plaintiffs would

would cause their property to be insured at the society's office, by a policy taken out for a year or for a longer term, the defendants (being such trustees and acting managers) undertook and promised the plaintiffs that their said property should be considered by the managers of the society as insured for 15 days beyond the expiration of the policy: and then averred the loss at the time before mentioned. [575] The declaration also contained the common money counts. *Plea non assumpsit.*

1805.

SALVIN
against
JAMES.

The cause was tried at *Guildhall*, at the sittings after last *Hilary* Term, before Lord *Ellenborough*, C. J. when a verdict was found for the plaintiffs for 3000*l.* subject to the opinion of the Court, on the following case:—

The defendants and *C. Bewicke*, since deceased, were three of the managers or acting members of the *Sun-Fire-Office*, being a society for the insurance of property against fire, according to the terms of their printed proposals which were annexed to the case. An advertisement was published in the public newspapers by the managers of this society, which advertisement has not been retracted, and is as follows:—" *Sun-Fire-Office*, 10th July, 1794. In consequence of several applications, the managers of this office do hereby inform the public, that all persons insured in this office by policies taken out for one year, or for a longer term, are and always have been considered by the managers as insured for 15 days beyond the time of the expiration of their policies; but this allowance of 15 days does not extend to policies for shorter periods, which cease at six o'clock in the evening of the day of the expiration of the time mentioned in the policies. *Hugh Watts*, secretary."—On the 11th of November, 1802, the plaintiffs caused to be effected in the said office the insurance in question, to the amount of 3000*l.* on their cotton-mill, millwright's work, clockmaker's work, carding and breaking engines, and moveable utensils; and paid the premium and duty; and that on that occasion the policy set out in the declaration, which is in the common form used in the office for insuring 3000*l.* on the said property from 11th of November, 1802, to 25th December, 1803, was executed on behalf of the office by the defendants and *C. B.* The plaintiffs' cotton-mill was stone and slated, and conformable to the rules of the first class of cotton rates, [576]

1805.

SALVIN
against
JAMES.

and in the plaintiffs' tenure; and they were duly interested in the premises insured. In *November, 1803*, the defendants gave notice to the plaintiffs that unless they agreed to pay *1*l.* 18*s.** per cent. upon the said insurance as from the 25th of *December, 1803*, instead of *1*l.* 1*s.** per cent. which the plaintiffs paid upon the policy in the pleadings mentioned, the defendants would not continue the insurance. To which notice the plaintiffs returned for answer, that they would not give that sum, as they had made their premises so secure. On the 7th of *January, 1804*, being within the period of 15 days after the expiration of the policy, the insured premises were consumed by an accidental fire; and on the 18th of *January* the plaintiffs gave notice of the loss to the agent of the defendants at *Durham*, and wrote to the office a letter, giving them a similar notice; and on the same day tendered to the defendants' agent the premium of *1*l.* 18*s.** per cent. the *then* rate of insurance used by the said office, for another year, and the duty; but the defendants by their agents, whose acts have been approved and ratified by the office, immediately declared that they did not consider the plaintiffs as insured at the time when the fire happened; whereupon no further steps were taken by the plaintiffs, and no money has been paid. When the loss happened, the plaintiffs had not paid or tendered the premium for another year. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If they were entitled, the verdict to stand; if not, a nonsuit to be entered.

[577]

The only article of the printed proposals particularly referred to in the argument was the third, as follows: "On bespeaking policies, all persons are to make a deposit for the policy, stamp duty, and mark; and shall pay the premium to the next quarter-day, and from thence for one year more at least; and shall, as long as the managers agree to accept the same, make all future payments annually at the said office within 15 days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place till the premium be actually paid by the insured, his, her, or their agent or agents."

This case was argued in the course of the term by *Richardson* for the plaintiffs, and *Pitcairn* for the defendants;

ants : and the only question was, How far the advertisement of the fire-office set forth in the case, which it was admitted was intended to obviate the effect of the opinion of the Court delivered in *Tarleton v. Stainforth* (a) varied this from the former case, supposing such advertisement to have been inserted as a new term in the printed proposals of the office ? The material circumstance which differed the two cases, and which was relied on by the counsel for the fire-office as absolving them from any responsibility, being that the insured having declined paying the advanced premium for the year ensuing, the managers of the fire-office had before the end of the year, and previous to the loss (which took place within 15 days after the termination of the year for which the insurance was made) given notice to the insured that they would not renew the insurance.

Lord ELLENBOROUGH, C. J. now delivered judgment. After [578] stating the pleadings :—

This question arises on the construction of the advertisement published by the *Sun-Fire-Office*, on the 10th July, 1794 ; and the point to be decided is, Whether this advertisement be an engagement by the office to indemnify all persons who may insure their property at that office for a year, for the space of 15 days after the determination of the period of their insurance, without any regard to an intention of continuing the insurance ? or whether it must not be considered as having relation to the 3d article of their printed proposals, and as being to be construed with reference to that article ? The terms of the advertisement being general, have furnished the argument that the right attached as soon as the policy was effected ; that no condition being mentioned or referred to in the advertisement, the right does not depend on any thing *ex post facto* ; and that it must be understood, not as an extension of the original policy, nor as an agreement to grant a new policy, which should have relation back to the determination of the old policy, but as an independent and absolute agreement to indemnify for the space of 15 days. And on this supposition the declaration is framed, by which it is alleged, that in consideration the

1805.

SALVIN
against
JAMES.

(a) 3 Term Rep. 695, in which case the general question upon the construction of the common printed proposals was fully argued.

1805.
 SALVIN
 against
 JAMES.

[579]

plaintiffs would insure for one year, the office undertook that the property of the plaintiffs should be considered as insured for 15 days beyond the time of the expiration of the policy. To this mode of construing the advertisement it has been objected, that all insurances by the office according to the first article of the printed proposals are to be "by policies signed and sealed by three or more of the trustees or acting managers, and that the office never professed to insure in any other way: and in order to give effect to this term or condition on which the office professes to insure, that the Court ought not to construe the advertisement to be an engagement independent of the terms and stipulation contained in and referred to by the policy, if by fair and reasonable construction it may be referred to and connected with the policy. The mode of insuring at this office, both before and since that advertisement, has been the same, namely, by a policy under seal, referring to certain printed proposals; by the 3d article of which it is provided, that all persons bespeaking policies are to make a deposit for the policy, &c. and to pay the premium to the next quarter-day, and for one year more at the least; and shall "as long as the managers agree to accept the same, make all future payments annually at the office, within 15 days after the day limited by their respective policies, upon forfeiture of the benefit thereof;" and that no insurance should take place till the premium was actually paid. On the construction of a similar policy in the case of *Turleton v. Stainforth*, 5 Term Rep. 695, the Court held, That until the premium were paid, persons who had insured were not protected by this article during the 15 days; and that the intention of the parties, as it was to be collected from the policy and article, was, that the policy should have no effect until the premium was paid; the object of the provision being to avoid the expence of new stamps, &c. And in the course of the argument in the case before us, it has been admitted that the advertisement was published in consequence of that decision, to obviate doubts which had arisen on account of it. And it is in effect a declaration by the office, that though the legal construction of the instruments did not bind them to make good losses happening during the 15 days, unless the premium were previously paid, yet that by the proposals they meant

meant, and their *intention* always *had been* and *was*, to protect the parties during the 15 days, though a loss might happen before the payment of the premium: and if that be so, there can be no question but that the advertisement must be construed with reference to the article, and as if the article were qualified and corrected by the advertisement. The policy refers to the printed proposals; and the advertisement must either have the effect of annulling the 3d article, or of varying it, if they cannot wholly stand together; of which there can be no doubt; and that the true way of understanding the advertisement is as a correction of the article, and not as a substitution of a new provision in its place, will appear from this:—That the advertisement does not merely declare how persons insured shall be considered, but how they always have been considered; which must necessarily refer to and respect the engagements the office had before made, that is, the policies and proposals which before the time of the advertisement had been executed and published by the office. It is in fact a declaration on the part of the office of the construction they at that time did, and always before had put upon their own instruments: it is no substitution of a new engagement different from what they had formerly made, in the place of such former engagement,—but an exposition of the sense in which the instruments forming those engagements had been understood by themselves, and were to be understood by others. If this be so, it brings us to what will be the true construction of this 3d article, if it be read as varied by the advertisement; and if so varied, it would stand as if at the end of the article, after the words “no insurance is to take place till the premium be actually paid by the insurer,” &c. there had been added this sentence:—“But all persons insured at this office by policies taken out for one year, or for a longer term, are considered by the managers as insured for 15 days beyond the time of the expiration of their policies:” the effect of which would be to confine the words “no insurance is to take place till the premium be actually paid” (on which the Court relied in *Turleton v. Stainforth*) to the premium to be paid on the original effecting of the policy, and to leave the article, as to the continuance of the insurance, just as if nothing had been said

1805.

SALVIN.
against
JAMES.

[581]

1805.

SALVIN
against
JAMES.

[582]

said in it as to the time when the insurance was to take place. Suppose then the article to be thus altered, it will still contain the clause of option in the managers to receive the premium, which, though it cannot be exercised during the 15 days, within which the assured may renew his assurance, so as to leave the assured liable to a loss within that period, as that would make the advertisement perfectly nugatory; for it would be in effect saying that they should be insured or not, according as the office should think fit to accept or refuse the premium for another year; yet as the option was most unquestionably intended to enable the office to determine the insurance, and to retain to them the power of refusing to renew it for another year, what is there, in case of their having made their option not to renew the assurance, which entitles an assured to an indemnity for the 15 days, who is in no condition to renew his insurance? The office had the power at any time during the year of saying to the assured, We will not contract with you again; we will not receive from you the premium for another year; and by such declaration, the object would cease for which the 15 days were allowed; and as no premium would be in such case to be received, no indemnity could be claimed in respect of it. The consideration of the indemnity during the 15 days, is the premium which may be paid within that period; but when that cannot be any longer looked to, or expected, the right to the indemnity must determine also. The effect of the 3d article and advertisement are to give the parties an option for 15 days, to continue the contract or not; with this advantage on the part of the assured, that if a loss should happen during the 15 days, though he have not paid his premium, the office shall not after such loss determine the contract; but that it shall be considered as if it had been renewed: but this does not deprive them of the power of determining the contract at the end of the term, by-making their option within a reasonable time before the end of the period for which the insurance was made. Where the premium is received, the effect of it is to give the assured an assurance for another year, to be computed from the expiration of the first policy, and not from the expiration of the following 15 days, which would be the case if the argument of the

the plaintiffs' counsel were well founded, that the interval of the 15 days is not comprised in the policy; if that were so, a new policy and new stamps would be necessary; whereas according to the present policy, regard being had to its relation to the printed proposals, it is an insurance for one year, and for so long as the parties please, provided the assured pay the annual premium within 15 days of the expiration of each year; with a restriction of the office alone from determining the policy after the year during 15 days of the following year, in case a loss should happen during that period; and on this head the argument used by the defendants' counsel from the annual duty on insurances, has weight to shew that the understanding of the parties was not that *for the 15 days* there should be an *absolute indemnity*; as in such case the duty would have been paid for that fractional part; from the non-payment of which the assured could not but conclude that his assurance was not meant to be an absolute unconditional assurance for more than a year, and such as the office had no power to determine until the 15 days after the year's end. Under this view of the question, it will not be necessary to say whether an insurance can be made by parol against the perils insured against by this policy: and as in this case there has been a determination of the contract by the plaintiffs having informed the office that they would not give the increased premium demanded by them for another year, there must be judgment for the defendants.

1805.

 SALVIN
against
 JAMES.

[583]

1805.

Monday,
July 1st.

The KING against The Hon. ROBT. JOHNSON.

Every plea to the jurisdiction of the Court ought to give some other Court by which the matter may be tried. Therefore, it is not sufficient for a native of Ireland, charged with the publication of a libel in Middlesex, to plead to the jurisdiction of *B. R.* that Ireland before the union was governed by its own laws, and not by the laws of Great Britain, and that since the union is yet governed by its own laws, &c. and that there always have been and now are courts and jurisdictions in Ireland, distinct from those in *G. B.* & competent for the trial of all offences committed by the natives resident there; & that the defendant is a native of and was resident in Ireland at the time of the offence alleged, and that the subject-

THIS was an indictment, found by the grand jury of the county of *Middlesex* against the Defendant, one of the Judges of the Court of Common Pleas in *Ireland*, charging him with having, and having caused to be written, published, and printed, at *Westminster*, in the county of *Middlesex*, a certain libel, therein set forth; which publication was alleged, in the prefatory part of the indictment, to have been made with intent to incite the king's subjects to hatred and dislike of his majesty's administration of government in this kingdom, and to cause * it to be believed that the people of that part of the U. K. of *G. B.* and *I.* called *Ireland*, were oppressed and injured by the king's government of the said part of the U. K. and to defame and vilify the persons employed by the king in the administration of the government of the said part of the U. K. and especially the Right Hon. *Philip* Earl of *Hardwicke*, Lieutenant-General and Governor-General of the said part of the U. K. and the Right Hon. *John* Lord *Redesdale*, the king's Lord Chancellor, &c. of the said part of the U. K. There were other counts charging an intention to defame the same and other public characters in *Ireland*, in other libels.

To this indictment the defendant put in the following plea to the jurisdiction of the Court; and now the said *Robert Johnson* in his own proper person comes, and having heard the indictment aforesaid read, and protesting that he is not guilty of the premises charged in the said indictment, or of any part thereof, for plea, nevertheless, saith, that he ought not to be compelled to answer to the said indictment, because he saith that the kingdom of *Ireland*, before and until the time of the union of the two kingdoms of *Great Britain* and *Ireland*, was regulated and governed by the proper laws and statutes of the kingdom of *Ireland*, and not by the laws or statutes of the kingdom of *Great Britain*, or matter of the supposed libel related to things in Ireland; for the objection, if any, going to the total want of jurisdiction in any of the Courts of this part of the kingdom to try the defendant for such an offence, it should either be taken advantage of by a plea in bar or by evidence under the general issue.

Besides the common four-day rule on a defendant in misdemeanor to join in demurrer to his plea, there must be a peremptory rule, giving him a certain day in the discretion of the Court; without which judgment cannot be signed against him.

* [584]

by

1805.

The KING
against
The Hon.
ROBT.
JOHNSON.

by the laws or statutes of *England*; and that ever since the union of the two kingdoms, that part of the said united kingdom of *G. B.* and *I.* called *Ireland*, hath been and yet is governed and regulated by the proper laws and statutes of that part of the said U. K. called *Ireland*, and not by the laws or statutes of that part of the said U. K. called *G. B.* or by the laws or statutes of *England*: And the said *Robt. Johnson* further saith, that in the said kingdom of *Ireland*, before the said union, and in that part of the said U. K. called *Ireland* since the said union, there always have been and now are courts and jurisdictions therein being and thereto belonging, distinct from the courts and jurisdictions of *G. B.* or of *England*, or of any part thereof, and competent and sufficient for the trial of all offences committed by the natives or inhabitants of *Ireland* during the time of their respective residence and commorancy in *Ireland*: and the said *R. Johnson* further saith, that he was born within *Ireland* aforesaid, and out of *Great Britain*, and before the said union (to wit) on the 1st of *October*, 1752 (to wit) at *Westminster*, in the county of *Middlesex*; and that he the said *R. Johnson*, on the 1st of *Nov.* 1802, and thenceforth continually, and until, at, and after the time of presenting the said indictment by the jurors aforesaid, in form aforesaid presented (to wit) until and upon the 31st of *May*, 1805, was resident and commorant within that part of the said U. K. called *Ireland*, and not elsewhere; and that the writings by the said indictment, called *Libels*, and in the said indictment mentioned, are of and concerning certain matters and things which took place in *Ireland* after the said 1st of *Nov.* 1802 (to wit) on the 23d of *July*, 1803, and subsequent thereto; and that the composing, writing, publishing, and printing the said writings by the said indictment called *Libels*, and causing the same to be composed, written, published, and printed in and by the said indictment alleged and mentioned, and the committing of all the supposed offences therein mentioned, took place, and were after the said 1st of *Nov.* 1802, and while he the said *R. Johnson* was so resident and commorant in *Ireland* aforesaid, and not elsewhere (to wit) on the 1st of *January*, 1804 (to wit) at *Westminster* aforesaid, in the county of *Middlesex* aforesaid; and this he is ready to verify. To this there was a general demurrer.

[585]

[586]

And on *Tuesday* the 25th of *June*, *The Attorney-General*,
moved

1805.
The KING
 against
The Hon.
ROBT.
JOHNSON.

moved the Court for a peremptory rule on the defendant to join in demurrer on the morrow; the usual four-day rule to join in demurrer having expired on *Saturday* the 22d, and the intervening *Monday* being a *dies non juria*. He stated, That the indictment had been found in *Michaelmas* term last, and no plea put in until this term, when the above plea to the jurisdiction of the Court was pleaded as of the last term: and that the object of his motion was to have the demurrer argued on *Saturday* next, the last crown paper-day in the term. That according to the practice on the civil side, (a) the plaintiff may enter the joinder in demurrer for the defendant, without giving him any rule to join in demurrer: and though by the rule of Court of *Trin. 1 Geo. 2.*, (b) by which that practice is regulated, if there be no joinder in demurrer by the time the rule (c) for pleading is out, the plaintiff may sign judgment, still the practice on the crown side of the Court has been not to enter up judgment without giving a peremptory rule to join in demurrer within such time as the Court shall direct. This appears from an ancient book in the Crown-office by Sir *Simon Harcourt*, formerly master of that office, where is this entry:—*Post regulam peremptoriam quatuor dies ad placitandum non de recto sed ex gratia; curia semper existens interrogata quando dies appunctuatur ut curiæ placet*. And he mentioned as instances of [587] such peremptory rules given, *The King v. Williams*, (d) where the Attorney-General having demurred to a plea to the jurisdiction, pleaded to an information for a libel; and the defendant being in court, it was insisted that he should join in demurrer *instantly*; (e) but the Court gave two rules for join-

(a) 2 Tidd's Prac. 649, 2d edit.

(b) Rules and Orders of K. B. p. 94, edit. of 1735.

(c) By the practice of the Crown-office there are two four-day rules given to bring a defendant in to plead, and then a peremptory rule is moved for, giving, in town prosecutions, the morrow; in country prosecutions, ten days to plead. In subsequent stages of pleading, only one four-day rule is given, and then a peremptory rule moved for, which is in general drawn up for four days more; but in vacation it is considered that such peremptory rule is not necessary.

(d) This was an information for a libel filed in the latter end of the reign of Car. 2. against the defendant, Speaker of the House of Commons, who as such had licensed, by order of the House, the publication of Dangerfield's Narrative, on which account he pleaded to the jurisdiction of the Court; to which plea the Attorney-General demurred; and on the first opening of the case, judgment of *respondens oster* was given: and finally the defendant was fined 10,000*l.* E. 2 Jac. 2. Skin. 217, Comb. 18, and Show. 471.

(e) This is said to mean within 24 hours; 1 Tidd's Prac. 508, 3d edit. which cites *Pryce v. Hodgson*, E. 35 Geo. 3. *Sed quare* by whom this account

ing in demurrer, and then a peremptory rule; after which, they said, if the defendant did not join in demurrer, they would give judgment; and the general practice in this respect, as reported by the same master in *Layer's* case, (a) "That in prosecutions for misdemeanors two four-day rules to plead are given, and a peremptory rule moved for; and then, if there be a demurrer, one four-day rule to join in demurrer is given, and a peremptory rule moved for: but that in capital cases (as that was) there is no rule given either to plead or join in demurrer, the prisoner being obliged in all cases to answer immediately." He also referred to two other precedents from the Crown-office, the one *Rex v. Ryder*, 8 Geo. 2, where, after the common rule was out, a rule was given for the defendant to join in demurrer peremptorily on the morrow: and *Rex v. Broughton*, Trin. 28 Geo. 2, where a rule was given on the defendant to join in demurrer on the Friday, and a peremptory rule on the Monday following. On these precedents, *The Court* now gave the rule required:—"That unless the defendant should peremptorily join in demurrer on the morrow, judgment should be entered for the king."

On *Saturday* the 29th, the demurrer was argued.

Abbott, in support of the demurrer. The rule is laid down in 1 *Doct. Plac.* 234, and *Mostyn v. Fabrigas*, (b) "That in every plea to the jurisdiction, the party must state another jurisdiction; as if an action were brought here for a matter arising in *Wales*, in order to bar the remedy sought in this court, the party must shew the jurisdiction of the court of *Wales*: and in every case to repel the jurisdiction of the king's court he must shew a more proper and more sufficient jurisdiction; for if there be no other mode of trial, that alone will give the king's courts a jurisdiction." Then, if there be no other court shewn competent to take cognizance of the offence imputed to the defendant in this case, it follows that this court must. Now, here the offence imputed being the publication of a libel in *Middlesex*, it is no answer to shew that the defendant is an *Irishman*, and that there are courts of justice in *Ireland* which have jurisdiction of the matter of libel; for they count of hours is to be kept? and whether *instantly*, as applied to the subject-matter, may not more easily be taken to mean before the rising of the Court, where the act is to be done in Court? or before the shutting of the office on the same night when the act is to be done there?

(a) 6 Stat. Tr. 238.

(b) Cowp. 172.

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1805.

The KING
against
The Hon.
ROBT.
JOHNSON.

[588]

1805

The KING
against
The Hon.
ROBT.
JOHNSON.

[589]

could not take cognizance of a libel published in *Middlesex* out of their jurisdiction: There are three classes of objections to the jurisdiction of the court; 1st, To the subject-matter of the suit, as in the case of land holden in ancient demesne. 2d, Where the subject-matter arises out of the ordinary jurisdiction of the court; as in case of charters creating exclusive local jurisdictions with a *ne intromittant* clause. These two clauses are out of the question: The 3d class goes to the person of the defendant; the usual instance of which is in the case of officers of the superior courts who are privileged to be sued in their own courts. The defendant by his plea sets up a new claim of personal privilege, as a resident subject (at the time of the offence committed) of that part of the U. K. called *Ireland*, which he alleges to have been an independent kingdom before the union, and governed still by its own peculiar laws, and having its own distinct and independent courts of justice, competent to the trial of all offences committed by its inhabitants; but whatever may have been the case before the union (though there would have been no difficulty in deciding that question) at least since the union every subject of *Ireland* is not merely a subject of the *king*, but of the *crown* of this realm (a). This, therefore, is the case of a subject sending a libel from one part of the realm to be published in another part: and at this day at least there is no difference between the present case and that of a subject sending a libel from one county in *England* to be published in another. As if an inhabitant of *Bristol*, which has an exclusive jurisdiction, were to send a libel into *Middlesex*, and publish it there, it could not be doubted but that he would be triable in *Middlesex*, and could not plead a similar plea to the jurisdiction. The plea amounts in effect to no more than an *alibi*; the defendant says that he cannot be guilty of publishing the libel in *Middlesex*, because he was at that time in *Ireland*; but that cannot make a difference; for in misdemeanor where all are principals, the rule applies *qui facit per alium facit per se*; (b) besides, if that were a good defence, it would avail him under the general issue, and the plea would be

[590]

(a) Lord Hale says, That Ireland, the Isles of Man, Jersey, &c. though not within the realm of England, are parcel of the dominions of the Crown of England. 1 Hale's P. C. 135, b. 317.

(b) Vide *Rex v. Tutchin*, 5 St. Tr. 538, and *Rex v. Middleton*, Bull. N. P. 6, causing a thing to be printed in London, is a publication there.

bad on that account, as amounting only to the general issue; but the defendant need not have been at the time of the offence committed in the county where the trial is afterwards had. As in the case of conspiracy, in *Rex v. Bowes and Others*, (a) where the acts of some of the conspirators were in *Middlesex*, the trial was had there, though the acts of others of the conspirators indicted at the same time were wholly confined to other counties. So in *Rex v. Brisac and Scott*, (b) which was an information for a conspiracy between the captain and purser of a man of war, for planning and fabricating false vouchers of payments on account, in order to cheat the crown; they were indicted in *Middlesex*, where such false vouchers were delivered for payment by innocent holders, which were, therefore, considered as the defendant's own acts, although the only acts proved to have been done by themselves personally in pursuance of the conspiracy, were either on the high seas, or at *Lerwick*, in the Isle of *Shetland*. Of the like nature was the case of one *Munton*, who was a government storekeeper in *Antigua*, and while resident there, transmitted false vouchers to his agent in *London*, which were by such agent delivered at the Custom-house in *London*; for which *Munton* was indicted and convicted at the sittings after *Michaelmas Term 1793*. Upon the same principle, where one employs an idiot or lunatic, who are themselves unconscious instruments of the crime to murder another,—the procurer, though absent at the time of the act done, is a principal. (c) He concluded with referring to what had been said by Mr. Baron *M. Leland* in the Court of Exchequer in *Ireland* (d) upon the return to the writ of *habeas corpus* sued out there by the defendant upon his arrest for this offence. "It has been urged by the prisoner's counsel, that the prisoner cannot be tried in *England* on the indictment, and should, therefore, be now discharged, inasmuch, say they, as he is not amenable to the laws of *England* for an act done there by his influence

1805.

—
The KING
against
The Hon.
ROBT.
JOHNSON.

(a) In 1787, cited in *Rex v. Brisac and Scott*, 4 East, 171.

(b) *Ib.* 164. (c) 1 Hale's P. C. 431.

(d) This was on the 7th of Feb. 1805; and is to be found in a publication, entitled "A Report of Proceedings in the Court of Exchequer in *Ireland* in the case of the Hon. Mr. Justice Johnson, by Mr. Emerson, Dublin, 1805."

and

1805.
 The KING
 against
 The Hon.
 ROBT.
 JOHNSON.

and procurement while he resided in *Ireland*. This position is too absurd to be combated: it would set at nought the principles and ties which bind the two countries together, and would hold out the greatest encouragement to crimes by the impunity it would afford. No authority has been quoted in support of it; and I conceive that I should ill discharge the duties of my office if I yielded to the confident assertion of such a principle:—a principle which, if acted upon, would go little short of separating the two countries. I will only say this, that every subject of the empire is bound by his allegiance to the crown to obey the laws of the empire: he is bound not to infringe the laws of any part of it, either by actually committing an illegal act, or procuring it to be done in any part of the empire; if he do so, he acts at his peril, and must answer for it.”

[592] *Richardson, contrà.* The principle applicable to persons natives of the same country, and living under the same jurisdiction and laws, does not apply to the natives of different countries amenable to different jurisdictions and laws. To enable any court to take cognizance of an offence, the act must not only be done locally within the jurisdiction, but the actor must be bound by the law which constitutes the offence. The defendant then being a native *Irishman*, and living at the time of the publication in question in *Ireland*, which has distinct laws of its own, was not bound by the law of *England*, though both countries owe allegiance to the same king. First, taking the case upon the general ground, as if *England* and *Ireland* had been wholly foreign to each other. The laws of a separate state are only binding upon the proper subjects of that state; and though a foreigner residing in *England* owe a temporary allegiance to the king during his residence, that is founded on an implied contract whereby he submits himself to the laws of the state, in return for the protection afforded him by the same laws. The civil law which binds the subject of each particular state, is distinguished from natural law, which binds all mankind. *Justinian’s Inst. lib. 1. tit. 2. s. 1*; (a) and the maxim *Nemo potest exuere patriam*, applies only to the proper state of which a man is born a subject, and to

(a) Vide Puffend. L. of N. and N. b. 2. c. 3. s. 23.

which

which he owes a natural allegiance: but local allegiance is due from a stranger only while he resides in a foreign state, and ceases as soon as he withdraws. (a) 1 *Blac. Com.* c. 10. In *Calvin's* case (b) the rule is given *protectio trahit subjectionem, et subjectio protectionem*. Therefore, even the presence of a stranger in a country, if not under the express or implied protection of its laws, will not subject him to their constraint; as in *Perkin Warbeck's* case, (c) who being an alien born, and invading the kingdom with an army to claim the crown, under pretence of being a son of *Edward the Fourth*; and being taken prisoner, was deemed not punishable by the common law. In *Moliere's* case, indeed, which was that of a *French* prisoner of war indicted capitally for privately stealing in a shop to the value of 20*l.* whom Mr. Justice *Foster* directed to be acquitted of the capital part of the charge, and found guilty of the simple larceny to the value laid in the indictment: a distinction seems to have been taken between *mala prohibita* and *mala in se*. [Lord *Ellenborough*, C. J. That case must not be considered as having the assent of the Court. For my own part, I could never see the distinction between convicting the prisoner of larceny at common law and of aggravated larceny by the statute: if liable to answer for the one, he must have been liable also for the other. *Grose*, J. assented to that opinion.] It should rather seem, upon general principles, that a prisoner of war, being brought into the kingdom and confined here against his will, was not bound at all by the laws of the country; but, at any rate if there be any such distinction, it must be admitted that the offence of libel is as much of positive institution as any which can be named. On the other hand, it has always been considered that a subject of this country is not bound by the revenue laws of a foreign state, but may enforce in *England* contracts made in breach of them; (d) and by a reciprocal rule, though the exportation of wool be by stat. 13 and 14 *Car. 2. c. 18. s. 11.* declared a public nuisance, for which a subject of *England* would be indictable, yet if done by the order of a foreigner residing abroad, he would not be amenable to trial

1805.

The King
against
The Hon.
Robt.
JOHNSON.

[593]

(a) Vide *Fost. Cr. L.* 185. (b) 7 *Rep.* 5. a. (c) 1*b.* 6. b.
(d) *Planche v. Fletcher*, Dougl. 251, and *Lever v. Fletcher*, in 1780, cor.
Lord Mansfield, C. J. *Park's Insur.* 269, 1st edit.

1805.

The King
against
The Hon.
Robt.
Johnson.
* [594]

here though he should afterwards come to this country. Secondly, It does not differ the case that *England* and *Ireland* are under the same sovereign, or that they have adopted the * same system of common law. It is doubtful at what period and by what authority the common law was first adopted in *Ireland* in the place of the *Brehon* law, which formerly prevailed there: Lord Coke (a) refers its adoption to the time of King John, *de communi omni de Hibernia consensu*; Lord C. J. Vaughan, (b) however, thinks that Lord Coke is mistaken; and that there was no consent of any *Irish* Parliament, but that it was imposed by conquest before, by Henry II. as appears in *Calvin's* case; (c) where it is also said that the king may change the laws of a conquered kingdom; but that until such change, the ancient laws remain. At all events, however, the law, when adopted, became and was in force there as the common law of *Ireland*, and not of *England*. It may, indeed, be said, that *Ireland* was for a long time a dependent kingdom, and that in fact this country legislated for it, particularly while the stat. 6 Geo I. c. 5. was in force; but that was repealed by the Act of the 22 Geo. 3. c. 53; and the stat. 23 Geo. 3. c. 28. made the matter still clearer by an express renunciation of the legislative and appellant jurisdiction of this country over *Ireland*. Before the Union, therefore, with *Ireland*, that kingdom stood in the same relation to *England* as *Scotland* did after the accession of James I. and before the union in the time of Queen Anne. The *Irish* Union has since strengthened the argument; for the two legislatures treated with each other upon the footing of perfect equality; and both then became extinct and gave birth to a new legislature compounded of the two: and by the 8th article (d) "all the laws in force at the time of the Union, and all the courts of civil and ecclesiastical jurisdiction within the respective kingdoms, are to remain as then by law established within the same;" thereby extending this article to both countries. If then by the Union the laws of *England*, as such, extend to *Ireland*, by the same rule the laws of *Ireland* would extend to *England*; but it would not be allowed that an *Englishman* residing here would be bound by the

[595]

(a) Co. Lit. 141, b.
(c) 7 Rep. 17, b.

(b) Vaugh. Rep. 29^c, 4, &c.
(d) 39 and 40 Geo. 3. c. 67.

laws of *Ireland* before the Union; and if not, the converse cannot hold good. There are some general rights common to both countries, such as that the people of either country may hold lands in the other, and have all the privileges of natural-born subjects; but these arise out of the allegiance due from both to the same king and crown; which is very different from owing obedience to the same laws,—a distinction which runs throughout *Calvin's* case; and as there is no pretence for saying that a *Scotchman* residing in *Scotland* is bound by the law of *England*, so neither is an *Irishman* residing in *Ireland*. The cases of *Rex v. Bowes and Others*, and *Rex v. Brisac*, were mere questions of *venue*; there was no dispute there but that the defendants were bound by the law of *England*, but only whether the acts done by them were sufficient to found a *venue* in *Middlesex*. Neither is this question affected by the precedents for trials of foreign treasons, committed by subjects of the king out of the realm of *England*, which are regulated by statute. The objection, that every plea to the jurisdiction must point out some other court in which the trial may be had, can only apply to cases where the question of jurisdiction arises between one or other of the courts of *England*,—not where the objection is personal and goes to all our courts. If a foreigner were upon his arrival in this country indicted for having, while residing abroad, directed the exportation of wool from hence, it would be sufficient for him to plead to the jurisdiction, without shewing any court competent to try him in his own country which would be impossible, as the act charged would be no offence elsewhere than in *England*. Then, with respect to this being properly a defence under the general issue, it was resolved in the case of the *Kinlochs*, (a) that the question of jurisdiction could not be raised upon the general issue. If, however, the law be only doubtful, the argument *ab inconvenienti* is very strong in this case; for as the law now stands, there is no process by which the defendant could compel his witnesses to attend here from *Ireland*; and even if a law were passed for that purpose, the expence would be ruinous.

1805.

The King
against
The Hon.
Robt.
Johnson.

[596]

(a) Fost. Cr. L. 16, &c.

1805.

The KING
against
The Hon.
ROBT.
JOHNSON.

Abbott, in reply said, that the argument *ab inconvenienti* could not be admitted where the law was clear. That the principal arguments resolved themselves into an objection, that an *Irishman* was to be considered as an alien with respect to the laws of *England*, for which no authority had been or could be cited; for there was no character or privilege belonging to a subject of this country which did not belong to an *Irishman*, both at home and abroad. Then, if protection and obedience are co-relative, as the defendant has every protection and benefit which the law of *England* can bestow, he must owe obedience to that law. If an *Irishman* were libelled by a subject of this country, he would have his redress; but the law of *England* would not punish an *Englishman* for libelling a foreigner residing abroad, except so far as it might be considered to be a state-offence in interrupting the harmony between the two countries, if in amity with each other. And this is also a charge of a libel upon the king's administration of government in *Ireland*. And in answer to the case of the *Kinlochs*, he observed that Mr. Justice *Foster* (a) was finally of opinion that the prisoners might, if it had been well founded, have availed themselves of the objection to the jurisdiction, on the general plea of not guilty.

[597]

Cur. adv. vult.

LORD ELLENBOROUGH, C. J. This is an indictment charging the defendant with the publication of a libel at *Westminster*, in the county of *Middlesex*; to which the defendant has pleaded, that before and since the union of the kingdoms of *Great Britain* and *Ireland*, *Ireland* had been and yet is governed by its proper statutes and laws, and not by the statutes and laws of *England*; and that in *Ireland* there are courts competent for the trial of all offences committed by the natives of *Ireland* during their residence there. The plea then proceeds to state, that the defendant was born in *Ireland*, and that the writings in the indictment, called Libels, are concerning things which took place in *Ireland* after the 1st of *November*, 1802, whilst he the defend-

(a) *Fost. Cr. L.* 23.

ant was the resident in *Ireland*; and concludes to the jurisdiction of the Court. To this plea there is a demurrer, and a joinder in demurrer. And in support of the demurrer it is objected that the plea is bad, inasmuch as it does not shew any other court where the defendant may be tried for this offence: and that it amounts but to an argumentative plea of not guilty. And in support of the objection to the manner in which this plea is framed, the *Doctrina Placitanda*, p. 234, a book of considerable authority on questions of pleading, and also what was said by Lord *Mansfield* in his judgment of the case of *Fabrigas v. Moysten*, in *Cowper's Reports*, 172, have been relied on, "that in every case to repel the jurisdiction of the king's courts, you must shew a more proper and sufficient jurisdiction; for if there be no other mode of trial, that alone will give the king's courts a jurisdiction." And as to this, there can be no question but that such is the general form of pleading in civil suits. And in the pleas to the jurisdiction of this Court, in the cases of *Eliot*, *Holles*, and *Valentine*, against whom an information was exhibited by the Attorney General in K. B. in the reign of *Car. I.* for words alleged to have been seditiously spoken in the House of Commons, there is an averment that the offences, if any, were committed in Parliament, and ought to be *there* tried and determined. *Vide Tremain*, 298. So in the case of *Kinlochs, Foster*, 17, which was referred to in the argument, where it was charged in the indictment that the offence was committed at *Fochabers*, in *Scotland*, the prisoners in their plea to the jurisdiction of the court of oyer and terminer stated, that the offence with which they were charged was triable in the Court of Justiciary, or in some courts, or before other justices in *Scotland*. The necessity of thus pleading in general was not controverted by the defendant's counsel; he, however, endeavoured to support the plea by saying, that the objection to the indictment being the *total* want of any jurisdiction in this part of the United Kingdom to try the defendant at all, it was impossible and unnecessary to state such other court or place of trial. This admission, in our opinion, clearly goes to shew that this plea is bad; for if that cannot be done in this case, which is required to be done in all pleas to the jurisdiction, the consequence will be, that the matter

1805.

The KING
against
The Hon.
ROBT.
JOHNSON.

[598]

of

1805.

The King
against
The Hon.
ROBT.
JOHNSON.

* [599]

of this plea is not proper to oust this Court of its jurisdiction to try an offence committed in the county where it sits, but is matter to be taken advantage of either by * plea in bar, or by evidence on the plea of not guilty. It will be recollected that the plea in question admits the commission of that crime which is charged in the indictment to have been committed in the city of *Westminster*; and the proposition which the defendant's counsel has contended for is in effect this:—Admitting the defendant to have committed a crime as to the laws of *England* in the county of *Middlesex*, I still insist that he is not punishable for it by any court of this part of the United Kingdom; though I cannot shew that he is punishable by any other. The stating of such a proposition carries almost on the face of it its own refutation, even without the conclusive authority of Lord *Mansfield* on that point, as already stated from *Cowp.* 172: to which may be added Lord *Hardwicke's* very decisive and peremptory opinion on the general subject in 1 *Vesey*, 202, and 2 *Vesey*, 357. In the first of these cases, which was that of *The Earl of Derby v. The Duke of Athol*, in 1748, a bill was filed for a discovery concerning the general title of the *Isle of Man*, and for relief relating to the rectories and tithes within that Island. “The defendant pleaded in general to the jurisdiction of the Court, that the *Isle of Man* was an ancient kingdom not part of the realm, though belonging to the crown of *Great Britain*, and that no lands, &c. there ought to be tried or examined into here; and demanding judgment whether he should be put to further answer. Lord Chancellor. This comes to be of great consequence to all the courts in *England*. There are two general questions on this plea; first, Whether the plea be good in point of form; not a trifling form; for if the objection thereto on the part of the plaintiff be right, it is material to the nature of such a plea. Secondly, Whether good in substance? As to the first, it is objected for the plaintiff, that although it be shewn in the negative, and alleged that this court has no jurisdiction over the *Isle of Man*, and that it is not to be tried here, yet it is not shewn in the affirmative, what other court has jurisdiction, or that there are any courts in the *Isle of Man* holding plea thereof: and the rule is insisted on, that whoever pleads to the jurisdiction of one of the king's superior

[600]

rior courts of general jurisdiction, must shew what other court has jurisdiction. I am of that opinion; and that for the want thereof the plea is bad, and ought not to be allowed, if nothing more be in the case; as it is expressly laid down in 2 H. 7. 17. a, and *Doctrina Placitanda*, 234, and is agreeable to the general rule of pleas of this sort; as in the pleas of abatement, wherein it must be shewn that the plaintiff may have a better writ. The reason of this is, that in suing for his right a person is not to be sent everywhere to look for a jurisdiction, but must be told what other court has jurisdiction, or what other writ is proper for him: and this is a matter of which the court where the action is brought is to judge. There are not many authorities on this head; but in the old books of entries the form of pleading is so; and the opinion of Popham, C. J. in *Yel.* 13, and *Fitz. Ab. tit. Jurisdiction concerning Wales*: and although Lord *Vaughan* may have denied that to be law, he was a very strong *Welchman*, as appears through his argument; in which there is a great deal of good and useful learning; yet it never was delivered, though intended to be so. It is said to this, that the Court ought in this case to take notice of what is the jurisdiction; that the matter of fact is shewn; and it is likened to the case of inferior courts, wherein it is sufficient for the defendant to plead that the cause of action arose out of the jurisdiction of that court. But I cannot put this (which is a superior court of general jurisdiction, in whose favour the presumption will be, that nothing shall be intended to be out of its jurisdiction which is not alleged and shewn to be so) upon a level with an inferior court of a limited local jurisdiction, within whose jurisdiction nothing shall be intended to be which is not alleged to be so, 1 *Saund.* 74. I was desirous to be informed how the pleas were in this Court, which are looser than at law; and no case has been cited in which the plea to the jurisdiction of this Court has not given jurisdiction to another, as to a visitor," &c. And afterwards, in *The Bishop of Sodor and Man v. The Earl of Derby*, 2 *Ves.* 357, Lord *Hardwicke*, speaking of the plea to the jurisdiction in the former case, and of the grounds on which he had over-ruled it, says, "I would not be understood when I over-ruled the plea of the Duke of *Athol*, to have over-ruled it on affirmance of the general juris-

1805.

The KING
against
The Hon.
ROBT.
JOHNSON.

[601]

1905. jurisdiction of this country to try and determine the title to the *Isle of Man*, or any such feudatory dominion; but merely on this:—The plea was to the jurisdiction, without averring to what court the jurisdiction belonged; and the rule of law is, that in a plea to jurisdiction, like a plea in abatement, where it is to a court of general jurisdiction, you must also shew where the jurisdiction vests, as well as negatively that it is not there: but if it be an inferior court, you need only plead thereto, and not shew where it is," &c. If then the circumstances attending the defendant, of his birth in *Ireland*, and his residence there at the time of the publication made in this country, have the effect of rendering him not punishable in any court in this country for such publication, this impunity must follow as a consequence, from its being no crime in the defendant, so circumstanced, to publish a libel in *Middlesex*. And indeed the argument rested wholly upon this position, that the defendant owed no obedience to the laws of this part of the United Kingdom, and if he owed no obedience to them, that he had been guilty of no crime in acting contrary to them. But such defence, if it can be in any form available in law, is matter of absolute bar, and an entire answer to the charge that he unlawfully published the libel in question; and the plea in that case ought not to have been in its present form, in which, as was said by the counsel for the crown, it is at most but an argumentative plea of not guilty. On this account therefore there must be judgment that the defendant answer over to the indictment.

[602]

Respondent ouster.

It was then ordered that the defendant do answer over *instantly*, otherwise that judgment must be entered against him peremptorily.

1805.

CROSBY against WADSWORTH.

Monday,
July 1st.

IN trespass, which was tried at the last *Lincoln* assizes, before *Chambre, J.* a verdict was found for the Plaintiff, damages 40s. subject to the opinion of the Court, on the following case:—The declaration stated, that the Defendant on the 9th of *July*, 1804, and on divers other days, &c. with force and arms broke and entered a certain close whereof the said plaintiff was then lawfully possessed, and trod down the plaintiff's grass and hay, and cut down the plaintiff's grass then growing in the said close, * and took and carried away the same, and also took and carried away the plaintiff's hay, then being on the said close, and disposed thereof to his own use. The second count was for an *asportavit* generally. Plea, not guilty.—The facts were, that on the 6th of *June*, 1804, the plaintiff agreed by parol with the defendant for the purchase of a standing crop of mowing grass, then growing in a close of the defendant's, situate in the parish of *Claypole*, for 20 guineas. The grass was to be mowed and made into hay by the plaintiff; but the parties did not absolutely fix upon any time in which the mowing was to be begun. No earnest was given, nor was any note, memorandum, or writing, signed by either of the parties or by any person on their behalf, nor was possession of the close given to the plaintiff, but was retained by the defendant. On the 2d of *July*, the defendant told the plaintiff he should not have the grass; and afterwards on that day sold it to *W. Carver* for 25 guineas. The plaintiff on the 12th of *July* tendered to the defendant 20 guineas for the crop, which the defendant refused to accept. The plaintiff went next morning to the defendant's close, and finding the gate unlocked, sent in a person to mow the grass, who cut near half of the close. On the evening of the 15th the defendant brought a letter from his attorney to the plaintiff, forbidding him to enter the close, and discharging him from mowing the grass. A lock was then fixed upon the gate by the defendant; and *Carver*, by his direction, carried away the grass which had been mowed, and afterwards cut and carried

One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *qu. cl. fregit* against any person entering the close, and taking the grass, even with the assent of the owner.

But this, being a contract or sale of an interest in or concerning land is voidable by the 4th section of the statute of frauds, 29 Car. 2. c. 3. if not reduced to writing, and may be discharged by parol notice from the owner before any part execution of it.

The first section of the statute of frauds, as construed by the 2d, is meant to vacate parol leases, &c. conveying a greater interest in land than for three years, and whereon a rent is reserved.

1806.
 —
 CROSBY
 against
 WADSWORTH.
 [604]

away the remainder of the crop. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover?

Rough, to the plaintiff, supposed that the action would be resisted by the defendant's counsel on two grounds; 1st, that the sale of the standing crop by parol was void by the statute of frauds. (a) 2dly, That trespass was not maintainable, because the plaintiff was not in possession of the close. As to the first, this is not a sale of "goods" within the 17th sect.; (b) which word is there coupled with "wares and merchandises," and cannot apply to a standing crop; and it has been decided that a sale of growing timber by parol is good, (c) as not being within the statute. So it is said in *Bull. N. P.* 34, that standing corn belongs to a devisee of land and not to the executor, though a devisee of goods, stock, and moveables, shall take it from both. (d)

And

(a) 29 Car. 2. c. 3.

(b) By s. 17 of 29 Car. 2. c. 3. "No contract for the sale of any goods, wares, and merchandises for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties," &c.

(c) 1 *Ld. Raym.* 182.

(d) For this is cited in *Spencer's case*, *Winch.* 51.: which goes only to the first branch of the position. For the latter branch is cited *Cox v. Godsalue*, *Holt's MS.* of which I have the following copy from the original:

Cox against GODSALVE.

TROVER and conversion by the plaintiff for corn. Upon not guilty pleaded, the case upon the evidence appeared to be, That Thomas Godsalue being seised in fee of a farm called Rawlins, and also possessed of divers goods and chattels made his will, dated 5th of March, 1697, and thereby devised, in the words following: "I give, devise, and bequeath unto my dear mother, Mrs. Mary Woollard, all that my farm, &c. called Rawlins Farm, now in my possession and occupation, during the term of her natural life; and after her decease to John Godsalue (the defendant) and the heirs male of his body; remainder over," &c. Before the making of the will the testator had grown great quantities of corn upon the farm; and by another clause in the will he devised thus: "I give and bequeath unto my mother, Mrs. Mary Woollard, all my goods and chattels, plate, and household goods, stock of my farms of Putehing Hall, in the parish of Bromfield, and Rawlins, in the parish of High Easter, &c. bonds, bills, book debts, and all other my moveables whatsoever, to be used and enjoyed by her for her benefit and advantage as she shall think fit during the full term of her natural life; and from and after her decease, my meaning is, that she shall, either by her last will and testament, or by my executor Samuel Cox, cause to be paid out of my said goods and chattels these following sums:" and then he gives several legacies; and makes Mary Woollard and Samuel Cox executors. Thomas Godsalue, before the severance reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to G. the devisee of the land.

And in *Waddington v. Bristow*, (a) a written agreement for the sale of growing hops to be delivered in pockets at a certain place, was holden not to * be within the exception in the Stamp Act 23 Geo. 3. c. 58. s. 4. as an agreement for the sale of "goods, wares, and merchandises." But even if this could be considered as a contract for goods, yet being executory, and something still remaining to be done, it would not be within the statute of frauds, according to *Towers v. Osborne*, (b) and *Clayton v. Andrews*; (c) and in this respect it is distinguishable from *Rondeau v. Wyatt*, (d) and *Cooper v. Elstone*, (e) where nothing further remained to be done to alter the condition of the goods, but they were only to be delivered at a future time. But here the thing to be sold was not to remain in *solido* from the time of the contract; for the grass was to ripen and be made into hay. Secondly, If the plaintiff had the possessory right of the close under this agreement, though the soil did not pass to him, he may maintain trespass against the owner of the soil to whom the acts of the second vendee acting under his authority may be attributed. And by *Co. Lit.* 4. b. the grantee, *vesturæ terræ* or *herbagii terræ*, may maintain tres-

1805.

CROSBY
against
WADSWORTH.
* [606]

of the corn, died, to wit, on the 10th of March, 1697, and on the 1st of April following, before severance of the corn, Mary Woollard died. On the 29th of April, Thomas Cox proved the will, and on the 27th of October following took out letters of administration to Mary Woollard. After the decease of Mary Woollard, the defendant John Godsolve reaped the corn sown by Thomas Godsolve, and converted it to his own use; for which this action of trover is brought. This cause came on to be tried before me (Holt C. J.) at the Lent assizes for Essex, 11 W. 3.

The question was, Whether the corn growing did pass to the defendant Thomas Godsolve by the devise of land sown to him? The case of *Spencer, Winch*, 51, was urged, where it was resolved that the devisee of land sown should have the corn, and not the executor of the deviser. To which it was answered, That is true if the intention of the testator doth not appear to be otherwise, as in this case it is most manifest; for that he gives all his goods, chattels, plate, and household stuff, stock of his farms, debts, ready money, and all other his moveables, &c. to his mother. If the devisee (*) hath the corn growing at the time of the testator's death, it is only against the executor, but not against a devisee of his goods; and it is hard to give it to the devisee (†) by implication against an express bequest. This case being afterwards referred to me for further consideration, I was of opinion that the corn did belong to the executor (†) as devisee, and not to the devisee of the land.

(*) *i. e.* of the land.(†) *Ibid.*

(‡) It is so worded in my copy of the MS. but this must mean the testator's mother, whom he made executrix and devisee.

(a) 2 Bos. & Pull. 452.

(b) 1 Stra. 506.

(c) 4 Burr. 2101.

(d) 2 H. Blac. 63.

(e) 7 Term Rep. 14.

pass

1605. pass *quare clausum fregit*, though he have not the soil. It is sufficient for this purpose, if he have an interest in the profits. *Bull. N. P.* 85. *Hoe v. Taylor, Moor*, 355, and *Dy.* 285, *b. pl.* 40. So an exclusive right of digging moss is a sufficient interest in the land to enable the party to maintain trespass. (a) And one who has the exclusive right to the herbage and feeding of a certain close, may distrain the cattle even of the owner trespassing upon the close. (b) and consequently may maintain trespass against him as well as against a stranger. [*Grose, J.* There the lessee was in the actual possession of the land.] So here it appears that the plaintiff entered peaceably; and the only question is, Whether he were justified in entering? for if he were, he was in possession. And it cannot be said that his entry was tortious, because it was part of the agreement that he might enter and cut the crop; and the defendant had the benefit of so much of the plaintiff's labour. If one purchase a horse and pay for him, he may take him out of the vendor's possession, or bring detainue. *Noy's Maxims*, c. 42; for the property is vested in the vendee by the sale before delivery. 2 *Blac. Com.* c. 30. Now here the plaintiff had an interest in the growing crop before entry, just as much as a lessee of the soil has, who may assign and do other acts of ownership; and the defendant could not by any act of his own divest the plaintiff's interest so as to make his entry tortious. At any rate, however, the plaintiff may maintain trespass, *vi et armis*, for carrying away the grass after it was severed by him: for if a man sell his trees, and the vendee cut them down, and the vendor take them, the vendee shall have trespass *vi et armis*. *Fitz. Abr. Trespass*, 149, and *Bro. Abr. Trespass*, 273, cite 5 *H.* 7. 10. So if one grant the vesture of his land for a term, and the grantor take away the vesture, the grantee shall have the like remedy. *Ibid.* And the law is the same with respect to other liberties and profits in the land of another: which was agreed by all the justices. *Ibid.* With regard to *Poulter v. Killingbeck*, (c) which was mentioned, that was observed by Lord *Ellenborough* to be an executed contract.

(a) 3 Burr. 1824, vide also *Harker v. Birbeck*, ib. 1556, 1563.

(b) *Burt. v. Moore*, 5 Term Rep. 329.

(c) 1 Bos. & Pull. 397.

Reader, *contrà*, contended, 1st, That the contract, not being in writing, was void by the statute of frauds. 2dly, That at any rate trespass would not lie in this case. 1st, That is either a parol contract for the sale of goods, in which case it is void by the 17th sect. of the statute; or it is a contract for some interest in or concerning land, when it is void by the 4th section. (a) The case in 1 *Ld. Ray*, 182, was merely a *nisi prius* decision, and has been much broken in upon by the subsequent case of *Waddington v. Bristow*, (b) where two if not three of the Judges considered that the contract for the sale of the growing hops gave the vendee an interest in the land; and they all agreed that the subject-matter did not come within the exception of a contract for the sale of "goods, wares, and merchandises," within the Stamp-Act. [Lord *Ellenborough* having intimated an opinion that this was an agreement for an interest in the vesture of the land, and so gave an interest in or concerning the land, asked how the case would be affected by the first and second clauses of the statute?] All interests created by any parol agreement in land, are made voidable, as estates at will, by the 1st section, which in general terms enacts, "That all leases, estates, &c. terms of years, or any uncertain interest of, in, to, or out of any lands, &c. by parol, &c. shall have the force and effect of leases or estates at will only," &c. with an exception in the 2d clause of leases not exceeding three years, which exception does not affect this case, as this was no lease of the land itself, but only the sale of an interest arising out of it; and then it comes expressly within the 4th clause, which respects contracts of sale and not of letting, and has no such exception as the 2d makes to the provisions of the 1st section. The contract was, therefore, either void under the 4th clause, or voidable under the 1st, and avoided by the subsequent notice before it became executed.

Rough, in reply, contended, That if this contract were to be considered as conveying an interest in the land, it

(a) By 29 Car. 2. c. 3. s. 4. "No action shall be brought, &c. to charge any person upon any contract, or sale of lands, &c. or any interest in or concerning them, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note hereof shall be in writing and signed by the party," &c.

(b) 2 Bos. & Pull. 452.

1805.

CROSBY
against
WADSWORTH.

[609]

1895.

CROSBY
against

WADSWORTH.

operated in law as a lease of the vesture; and then being for a less period than three years, it was saved out of the operation of the 1st by the 2d clause of the statute. That the taking of an aftermath (a) had been holden to be a tenement so as to confer a settlement by 40 days' occupation, which shewed that it gave an interest in the land, such as exists between landlord and tenant. Then the 4th clause was not meant to operate as a repeal of the second, but merely takes away the remedy upon contracts voidable by the first clause and not saved by the second, and which are afterwards legally avoided.

Cur. adv. vult.

[610]

LORD ELLENBOROUGH, C. J. (after stating the case): As the plaintiff appears to have been entitled (if entitled at all under the agreement stated) to the exclusive enjoyment of the crop growing on the land during the proper period of its full growth, and until it was cut and carried away, he might in respect of such exclusive right maintain trespass against any persons doing the acts complained of in violation thereof, according to the authority of *Co. Litt.* 4. b, the authorities cited from *Brook* and *Fitzherbert*, and the case of *Wilson and Mackreth*, 3 *Burr.* 1826, &c. which fully maintain this position. This brings us to the question, Whether the plaintiff had, under the agreement and circumstances stated, any legal title to this growing crop at the time when the injury complained of was done? or, Whether his supposed title thereto was not wholly void, as being created by parol, under any, and which of the provisions in the statute of frauds, or on any and what other account? And in the outset I feel myself warranted in laying wholly out of the case the provision contained in the 17th sect. of this statute, as not applicable to the subject-matter of this agreement, which cannot be considered in any proper sense of the words as a sale of goods, wares, or merchandises; the crop being at the time of the bargain (and with reference to which time I agree with Mr. Justice *Heath*, in *Waddington and Bristow*, 2 *Bos. & Pull.* 452, that the subject-matter must be taken) an unsevered portion of the

(a) *Rex v. Stoke*, 2 *Term Rep.* 451,

freehold, and not moveable goods or personal chattels. The next question then is, Is it a "lease, estate, interest of freehold or term of years, or an uncertain interest, of, in, to, or out of lands created by parol," within the meaning of the 1st section, so as to be void, as not having been put into writing? I think, collecting the meaning of the first by aid derived from the language and terms of the second section, "and the exception therein contained, that the leases, &c. meant to be vacated by the 1st sect. must be understood as leases of the like kind with those in the 2d sect." but which conveyed a larger interest to the party than for a term of three years, and such also as were made under a rent reserved thereupon; neither of which circumstances are to be found in this agreement for the growing crop. Supposing it, therefore, on this construction of the statute, not vacated as a lease, &c. under the 1st sect. it then comes to be considered under the 4th sect. of the act, Whether this purchase of the growing crop be "a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them?"—and if it be so, then, Whether this action of trespass be "an action brought to charge the defendant on such contract or sale," within the meaning of the statute? Upon the first of these questions I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for giving purposes, is a contract or sale of an interest in, or at least, an interest concerning lands. But the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party or his representatives on the ground of such contract, and of some supposed breach thereof; which description of action does not properly apply to the one now brought, viz. a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land, may not be in itself wholly void under the statute, merely on account of its being by parol; so that if the same had been executed the parties could have treated it as a nullity;—yet, being executory, and as for the non-performance of it no action could have been by the provisions

1805.

CROSBY
against
WADSWORTH.

[611]

1805.

CROSBY
against
WADSWORTH.

[612]

provisions of the 4th sect. maintained, we think it might be discharged before any thing was done under it which could amount to a part execution of it. And this discharge, unfortunately for the plaintiff, appears to have been given in the present instance, on the 2d of *July*, by the countermand and refusal of the defendant of that date, before the plaintiff had done any one act towards carrying the agreement into effect. On this latter ground, therefore, viz. that this parol executory contract, supposing it to have been otherwise valid, was competently discharged by parol, we feel ourselves obliged to say that the plaintiff is not entitled to recover. The case suggested at the close of the argument, of *Poulter, v. Killingbeck*, 1 *Bos. & Pull.* 397, has no material application in favour of the plaintiff. That was an action of *indebitatus assumpsit* and *quantum meruit*, for moieties or crops of wheat sold by the plaintiff to the defendant, and accordingly reaped for his, the defendant's, own use and benefit, and upon a count for money had and received. The case was, that the plaintiff had let to the defendant land without rent, from which he was to take two successive crops, and to render to the plaintiff a moiety of the crops in lieu of rent. Afterwards, the value of the crops was ascertained by appraisement, and the defendant became liable for the moiety of the value of the crops which he took to his own benefit, instead of a moiety of the crops themselves. It was objected that the agreement was within the statute of frauds, 1st, as relating to land; 2dly, as not being to be executed within a year. As to the first objection, the contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce no longer did so: it was originally an agreement to render what should have become a chattel, *i. e.* part of a severed crop in that shape, in lieu of rent; and by a subsequent agreement it was changed to money, instead of remaining a specific render of produce. So that one wonders rather how it should ever have been thought an interest in land, than that it should have been decided not to be so. The subsequent agreement relieved the case also from the second objection.

Postea to the Defendant.

WELCH

1805.

WELCH against IRELAND.

Monday,
July 1st.

THIS was an action of debt on bond, conditioned to perform an award, on which the Plaintiff obtained judgment by default for the penalty, and charged the Defendant in execution for the amount of the sum awarded.

Littledale obtained a rule *nisi* on a former day for setting aside the execution, and discharging the defendant out of custody, upon the ground that the plaintiff ought to have assigned breaches under the statute 8 & 9 *W. 3. c. 11. s. 8.*; (a) against which

Wood now shewed cause, and endeavoured to distinguish this from the former cases, (b) because here there was only a single sum to be paid, and the jury had nothing to inquire of, but were bound to give the sum awarded, which was now verified by affidavit and not disputed. And he suggested that the first case, that of *Drage v. Brand*, wherein it is stated that it is compulsory on a plaintiff to assign breaches on the statute, was wrongly reported; for the Court decided, that it was optional in the plaintiff to go for the penalty, or to assign breaches; but that if he did assign breaches, as was done in that case, it was compulsory on the jury to assess damages on the breaches so assigned; and, therefore, the verdict being taken for the debt in that case, the Court awarded a *venire de novo*. But [614]

The Court said, that it had been so often and so solemnly decided that the statute of King *William* was compulsory on the plaintiff to assign breaches, that it could not be questioned; and that they thought that construction right. And that though it turned out that there was only a single sum to be paid upon the bond, yet the bond being to perform an award,—in other words, to perform an agreement, it came directly within the words of the statute, the sum to be recovered being ascertained through the medium of the award.

Rule absolute.

(a) Vide *Willoughby v. Swinton*, ante, 551, n., (g) where the statute is set out.

(b) *Drage v. Brand*, 2 *Wills*. 377. *Roles v. Rosewell*, 5 *Term Rep.* 538. *Hardy v. Bern*, ib. 638. *Walcot v. Goulding*, 8 *Term Rep.* 126; and *Willoughby v. Swinton*, ante, 550.

1805.

Tuesday,
July 2d.HANSON and Another, Assignees of WALLACE and
HAWES, Bankrupts, against MEYER.

Under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt. by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and 14 days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch: held, that under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse in the name and at the expence of the vendor.

THIS was an action of *trover*, brought to recover the value of 33 cwt. 1 qr. 21 lb. of starch, which was tried before Lord *Ellenborough*, C. J. at the sittings at *Guildhall*, after *Trinity* Term, 1803, when there was a verdict for the Defendant; and a motion being made for a new trial, which was argued (a) in last *Michaelmas* Term, the Court by consent in *Hilary* Term last, ordered a case to be *made of the facts that were proved at the trial; which are as follows:

The Plaintiffs are assignees of *J. Wallace* and *W. Hawes*, under a commission of bankrupt issued against them. The defendant is a merchant in *London*. In *January*, 1801, the bankrupts employed *Wright*, their broker, to purchase, of the defendant a quantity of starch, about four tons, belonging to the defendant, and which was then lying in the *Bull Porters'* warehouse in *Seething-lane*; and *Wright* accordingly purchased the starch of the defendant, at 6*l.* per cwt. and sent to the bankrupts, his principals, the following note: "Dear Sirs, I have bought that small parcel of starch, which you saw, of Mr. *James Meyer* for your account 6*l.* per cwt. by bill at two months; 14 days for delivery from the 14th instant." "Jan. 15th, 1801. Yours, &c. *T. Wright*." The starch lay at the *Bull Porters'*. The broker purchased for the bankrupts all *Meyer's* starch that lay there, more or less whatever it was, at 6*l.* per hundred weight: it was in papers: the weight was to be afterwards ascertained at the price aforesaid. The mode of delivery is as follows; the seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the

(a) *Erskine* and *Holroyd* opposed, and *Garrow*, *Gibbs*, and *Humphreys* supported the rule.

goods to the vendee. The following note was given by the defendant: "To the *Bull Porters, Seething Lane.*" 1805.

"Please to weigh and deliver to Messrs. *Wallace and Hawes* all my starch." "Jan. 17th, 1801. Per *James Meyer, William Elliott.*" This order was lodged by the bankrupts, at the *Bull Porters'* warehouse on the 21st of *January*, 1801, on which day the bankrupts required the *Bull Porters* to weigh and deliver to them 450 papers of the starch, which weighed

HANSON
and Another,
Assignees, &c.
against
MEYER.

[616]

		Cwt.	qrs.	lb.
		21	1	6
And on the 31st Jan.	250	9	1	20
And on the 2d Feb.	400	15	1	4
	<hr/> 1100	<hr/> 46	<hr/> 0	<hr/> 12

At which respective times the *Bull Porters*, in consequence of their order, weighed and delivered the same to the bankrupts, who immediately removed the same: the residue thereof, being 33 cwt. 1 qr. 21 lb. remained at the *Bull Porters'* warehouse till the failure of *Wallace and Hawes*. The above quantities of starch continued at the *Bull Porters'* warehouse, in the name and at the expence of the defendant, till they were weighed and delivered; and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expence. On the 8th of *Feb.* 1801, *Wallace and Hawes* became bankrupts. It was admitted that the defendant, after the bankruptcy, took away the remainder of the starch that had not been so weighed. The question for the opinion of the Court was, Whether the defendant were entitled to the above verdict? If the Court should be of opinion that he was, then the verdict was to stand: if not, then a new trial was to be granted upon such terms as the Court should direct.

Humphreys, for the plaintiffs. This was an entire contract, which could not be severed or apportioned; and, therefore, upon the delivery of any part of the starch to the bankrupts, the property of the whole became vested in them. It was not a contract for so many cwt. of starch, but for all the defendant's starch which lay at the *Bull Porters'* warehouse; the weight only of which was to be afterwards ascer-

[617]

1805.

HANSON
and Another,
Assignees, &c.
against
MEYER.

tained; but the whole was to be paid for by one bill; and there is the more reason for holding such a contract to be entire, because the price of the whole may be governed by the average quality, and the part received may be the worst; or at any rate it may be an inducement to a purchaser to give more for the whole than he would for a part, in order to withdraw so much competition out of the market. After the order for delivery, the bankrupts might have taken the whole as well as a part. In *Bro. Abr. Apportionment*, pl. 7, it is said, That "a contract cannot be severed or apportioned, &c because it is entire; and if it be destroyed in part, it is destroyed in the whole." Again, *Bro. Contract*, pl. 34, "If a man sell a lease of land and certain clothes for 10*l*. the contract is entire and cannot be severed; though one of the things were by a defeasible title," &c. So in *Hawkins v. Cardy* (a) it was ruled that a bill of exchange, being one entire contract, could not be apportioned by indorsement, so as to make the drawer liable in part to different holders. If the vendees had continued solvent, and after taking part of the starch a fire had consumed the remainder in the warehouse, they would still have been liable; for after the sale, the commodity is at the risk of the vendee. *Bro. Abr. Contract*, pl. 26. Upon the same principle, if goods purchased are to be paid for before they are taken away, and afterwards the vendor gives the vendee liberty to take away a part without payment, that would dispense with the condition as to the remainder, according to the doctrine in *Dunpor's* case; (b) and the only remedy of the vendor would be upon the contract for the value of the goods sold. It is clear from the cases of *Slubey v. Heyward*, (c) and *Hammond v. Anderson*, (d) that after a part-delivery there can be no stopping *in transitu*, which is decisive as to the property of the whole being absolutely vested in the vendee; and yet in the latter case the vendor put in his claim before the expiration of 14 days, during which time the goods were to remain at his charge in the wharfinger's warehouse. The only distinction between the two cases is, That here the starch was to remain in the warehouse at the expence of the vendor till it was weighed; but that was merely to ascer-

[618]

(a) 1 Ld. Ray. 360.
(c) 2 H. Blac. 504.

(b) 4 Rep. 119. b.
(d) 1 New Rep. 69.

tain the price, and would not alter the legal property. It was also observed, That no cases in equity had occurred which applied pointedly to the present. *Fawell v. Heelis*, (a) was mentioned as coming nearest; where it was holden that a vendor of an estate, who had taken a bond for the consideration-money, had no lien on the estate against the creditors of the vendee, for whose benefit the estate was assigned; and here the vendor had relied on the security of a bill which was to be given, payable at a future day.

Holroyd, contra, after observing, That it was just and reasonable that upon every sale of goods the vendor should either receive the stipulated price, or should have power to retain the goods, or so much of them as were not absolutely delivered over to the vendee upon credit, contended, 1st, That the legal property of so much of the starch as remained unweighed in the warehouse did not pass to the vendees: or, 2dly, If it did, yet the vendor retained a lien upon it for the stipulated price of the whole. 1st, On a sale of specific goods (and these may be taken to be so, being a specific quantity of starch, though the amount was not ascertained at the time of the contract) the property does not pass except upon payment, or tender of payment by the buyer, or where the time of payment is by consent postponed. (b) Now here, by the terms of the contract, 14 days were to be allowed for the delivery on the one hand; and on the other, the payment was to be by a bill at two months: the vendees, therefore, were not bound to pay for the starch till it was delivered, nor was the vendor bound to part with it till he received the bill. In *Knight v. Hopper*, (c) where the note of the contract of sale was to this purpose: "Bought by *Knight*, of *Hopper*, 100 pieces of muslin, at 40s. per piece, to be fetched away by 10 pieces at a time, and paid for as taken away,"—what was relied upon by *Holt, C. J.* as altering the property immediately was. That the pieces were *marked and sealed* by the vendee; and there too the price was fixed: but here there was no act done by the vendees to mark the goods as their own. It was not an order simply to *deliver*, but to "*weigh and deliver*;" the *weighing* was to precede the *delivery*: and even the price could not

1805.

HANSON
and Another
Assignees, &c.
against
MEYER.

[619]

(a) Ambl. 724.

(b) 2 Blac. Com. 446, 7.

(c) Skin. 647.

1805. be ascertained *till they were weighed*; so that till then it could not be known whether the vendees would pay the price or not; but certainly the vendor was not bound to part with the goods till he had a bill at two months for the ascertained value. In a case (a) where a son employed his father to buy a frame for him, and the father purchased it in his own name, and paid part of the money, and gave a note for the rest, *Holt, C. J.* held, That by the payment of the money *and giving the note*, the property of the frame was immediately vested in the father; and that the bill of sale which was made a month afterwards to the son did not divest the property out of the father and vest it in the son; though it would have vested it in the son if it had been made at the time of the sale; and he added, that *earnest* does not alter the property, it only binds the bargain; and the property remains in the vendor *till payment, or delivery of the goods*. In 2 *Black. Com.* 443, it is said that a contract *executory*, as if two agree to change horses *next week*, vests only a *right*; and their reciprocal property in each other's horse is not in possession but *in action*, &c.; for a contract *executory* conveys only a *chose in action*. Here then, till the goods were weighed and the price ascertained and the bill given, or at least tendered, the contract remained *executory*, and no property passed; but each only had his remedy upon the contract on failure of performance by the other. 2dly, At any rate, however, if the property did pass to the vendees, the vendor had a lien on the goods for the price, or the bill, provided the vendees had remained solvent and capable of giving such a security. If the rest of the goods had remained in the vendor's own possession, there could have been no doubt that he might have retained any part for the price at least of that part. If one ordered an hundred pair of shoes of a shoemaker at so much a pair, to be paid for by a bill; though the shoemaker had delivered half, yet if the vendee became insolvent, the tradesman would not be bound to deliver the remainder without payment; and yet the insolvency does not rescind the contract; but the vendor has an equitable lien for the price, and this lien continues notwithstanding even a part payment; as in

HANSON
and Another,
Assignees, &c.
against
MEYER.

[620]

(a) Anon. 12. Mod. 344.

Hodgson v. Loy, (a) and *Fife v. Wray*, (b) where part payment of the goods was holden not to divest the vendor's right to stop *in transitu*; and, * *a fortiori*, it cannot divest his lien upon the goods while they still continue in his possession; for Lord *Kenyon* himself put it upon that ground; saying, "That the right of the vendor to stop goods *in transitu*, in case of the insolvency of the vendee, was a kind of equitable lien adopted by the law for the purposes of substantial justice, and that it did not proceed on the ground of rescinding the contract. Then it cannot vary the case that the goods here were in the hands of a middleman; for they remained all the time in the *Bull Porters'* warehouse, in the vendor's name, and at his expence. In the cases in the Common Pleas there was a severance by the vendees themselves of part of the goods from the rest, which could not have been done without a possession of the whole by them, so as to bar the vendor's right of stopping any part as *in transitu*; and in *Hammond v. Anderson*, (c) there was this further material circumstance, that all the goods have been weighed out to the vendee; but cases of *transitu* do not affect the question of *lien*, which can only arise while the goods are in the actual or constructive possession of the vendor. Liens are mutual; and a sale is only an exchange of goods for money; but if a delivery of part of the goods contracted for, without payment, be a waiver of the vendor's lien for the price, then by payment of part of the money by the purchaser, he would wave his lien on the remainder, which might be recovered from him by action without a delivery of the goods. Suppose an exchange of two horses for one, would a delivery of one of the two preclude the owner's lien on the other till the delivery of the one horse for which the two were to be exchanged? There is no distinction in reason between an exchange of goods for goods, and of goods for money. If an action be brought by a vendee, after part of the price of goods paid, he must allege that he had, or offered to pay the remainder. The principle is general, that he who sues another for a breach of contract must aver performance, or what is equivalent to performance on his part;

1865.

HANSON
and Another,
Assignees, &c.
against
MEYER:
* [621]

[622]

(a) 7 Term Rep. 440, 5. (b) 3 East, 93. (c) 1 New Rep. 69.

1805.

HANSON
and Another,
Assignees, &c.
against
MEYER.

as in *Morton v. Lamb*, (a) and *Collonel v. Briggs*; (b) and, therefore, the vendor of goods has a lien on any part of them for the price of the whole: he only lessens his security by delivering up any part before payment. Thus in *Sodergren v. Flight and Jennings*, before Lord *Kenyon* at *Guildhall*, sittings after *Trin.* term 1796, in an action for freight, it appeared that the plaintiff was the captain and owner of a *Swedish* ship freighted by *Shenling and Co.* for *London*, with a cargo of tar and iron, consigned to *Hippius*, a merchant in *London*, who held two bills of lading for the same. The defendants in *December*, 1795, before the arrival of the ship, purchased all the tar of *Hippius*, and gave him their acceptances for the value, including a proper allowance for freight and duty, which were to be paid by *Hippius*: and *Hippius* indorsed the two bills of lading to the defendants, or their order; one of which was for tar alone, 900 barrels; the other for 850 barrels of tar, and a quantity of iron. *Hippius* sold the iron to *Crawshay and Co.* and for this purpose obtained from the defendants the possession of the bill of lading which included the iron, and delivered it to *Crawshay and Co.*; concerning which there was no question. On the 11th *January*, 1796, the ship arrived, and was entered and reported by *Hippius*; and before the 25th, 721 barrels of tar were delivered to the defendants. On that day *Hippius* stopped payment; on which the captain refused to deliver the remainder of the tar to the defendants, unless they would pay the freight not only of what remained, but of what had been before delivered, which they refused to do: but after some dispute, the whole cargo of tar was agreed to be delivered to the defendants, and that an action should be brought by the captain for the whole freight, in order to try the right of his lien; the defendants having offered to pay the freight of that which remained on board the ship: but refusing to pay the freight of that part which had been before delivered to them, and also of a certain portion which had been delivered out of the ship on board a lighter sent by the defendants to receive it, but which still lay along-side of the ship, fastened thereto by

[623]

(a) 7 Term Rep. 125.

(b) Salk. 112.

the captain's orders, to prevent its final removal. The defendants paid into court in the action 353*l.* 1*s.* 2*d.* being as much as would cover the plaintiff's demand for freight on all the tar comprized in one of the bills of lading; and each being made "unto order, he or they *paying freight for the said goods*; and the plaintiffs, under the direction of Lord *Kenyon*, recovered 300*l.* 15*s.* 10*d.* beyond the money paid into court, being the entire amount of the freight for the tar; his Lordship being of opinion that the captain had a lien on the tar remaining on board for the whole freight, as well the freight of the barrels delivered as of those remaining on board, belonging all to the same person, and under one consignment; but he thought that if *Hippius* had sold the tar to different persons, the captain could not have made one pay for the freight of what had been delivered to another. [*Le Blanc*, J. That was where all the goods were received on board under one contract.] So in *Langfort v. Administratrix of Tiler*, (*a*) the defendant in the lifetime of the intestate, her husband, having bought of the plaintiff four tubs of tea, one of which she paid for and took away, leaving 50*l.* earnest for the other three,—*Holt*, C. J. held, That notwithstanding the earnest (which only bound the bargain, and gave a right to demand the rest *on payment of the money*) the money must be paid upon fetching away the goods, because no other time for payment was appointed; and that if the vendee did not come and pay for the goods in a reasonable time, after request, the agreement was dissolved, and the vendor was at liberty to sell them to any other person. In *detinue*, (*b*) where there had been a part delivery of a certain quantity of corn contracted for, and payment for what was so delivered, the Court considered that the vendor had a lien upon the remainder for the residue of the money, and was not bound to deliver it till payment, and might plead *non detinet*: and the distinction was taken, that if goods be bought outright, the bar-

1805.

HANSON
and Another
Assignees, &c.
against
MEYER.

[624]

(*a*) Salk. 113. The same case is reported in 6 Mod. 162, where the case is stated to be, that the goods were contracted to be sold by the defendant to the plaintiff, who paid for one of the tubs, and gave 50*s.* earnest for the remainder; and the declaration contained two counts, one on the agreement, as it appears, for the non-delivery of the other tubs; the other, to recover back the 50*s.* as so much received to the plaintiff's use. The result of the doctrine is the same in both books,

(*b*) Anonym. Dy. 29, *b*.

1805. gain is void if the vendee do not pay the price agreed upon immediately; but if a day of payment be appointed, the vendor shall have his action of debt, the vendee an action of detinue. As to the position in *Dumpor's* case, (a) that a condition waved in part is waved *in toto*, it cannot apply to *liens* which at most are only conditions in law founded on principles of equity, and not like conditions stipulated for by the parties themselves, which are always construed strictly, being in general to defeat an estate or create a forfeiture.

HANSON
and Another,
Assignees, &c.
against
MEYER.

[625] *Humphreys*, in reply, said, That the property was altered by a sale, as well where a future day of payment was given, as where the goods were paid for at the time. 1 *Com. Dig.* 513, *Agreement*, B. 3, cites 10 *H.* 7, 8, a. 14 *H.* 8, 20, a. *Dy.* 30, a. It is true the vendor might have withheld the order for delivery till he received the bill which was agreed to be taken for payment; but he waved that benefit, and gave an order for the delivery of the whole. Then the severance of a part was as much evidence of a possession of the whole by the vendee in this case, as in the late cases in the Common Pleas. Those cases went on the ground that the sale of the goods being by one entire contract, possession of part was possession of the whole, out of which such part was taken; and if the property passed by the contract, the payment of the warehouse rent afterwards by the vendor cannot alter it.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J. now delivered judgment.

By the terms of the bargain, formed by the broker of the bankrupts on their behalf, two things, in the nature of conditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for; the first of them is one which does so according to the generally received rule of law in contracts of sale, viz. the *payment* of the agreed price or consideration for the sale. The second, which is the act of *weighing*, does so in consequence of the particular terms of this contract, by which the *price* is made to depend upon the *weight*.

(a) 1 Rep. 11, b.

The weight, therefore, must be ascertained, in order that the price may be known and paid; and unless the weighing precede the delivery, it can never for these purposes effectually take place at all. In this case * a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price so depending on the weight could yet be given. The question is, What is the legal effect of such part-delivery of the starch on the right of property in the undelivered residue thereof? On the part of the plaintiffs, it is contended, That a delivery of part of an entire quantity of goods contracted for, is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole; although the price for the same should not have been paid. This proposition was denied on the part of the defendant; and many authorities have been cited on both sides: but, without deciding at present what might be the legal effect of such part-delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property; in this case another act, it will be remembered, was necessary to precede both payment of price and delivery of the goods bargained for, viz. *weighing*. This preliminary act of weighing, it certainly never was in the contemplation of the sellers to waive in respect of any part of the commodity contracted for. The order stated in the case from the defendant to the *Bull* Porters, his agents, is *to weigh and deliver all his starch*. Till it was weighed, they as his agents were not authorized to deliver it; still less were the buyers themselves, or the present plaintiffs, their assignees, authorized to take it by their own act from the *Bull* Porter's warehouse; and if they could not so take it, neither can they maintain this action of *trover*, founded on such a supposed right to take; or, in other words, founded on such a supposed right of property in the subject-matter of this action. If any thing remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to and depends on such supposed perfect right of property, is not maintainable.

The

1805.

HANSON
and Another,
Assignees, &c.
against
MEYER.

* [626]

[627]

1805. The action failing, therefore, on this ground, it is unnecessary to consider what would have been the effect of non-payment of price on the right to the undelivered residue of the starch, if the case had stood merely on that ground, as it did in the case of *Hammond and Others* against *Anderson*, 1 *New Rep.* 69; where the bacon sold in that case was sold for a certain fixed price, and where the weighing, mentioned in that case, was merely for the buyer's own satisfaction, and formed no ingredient in the contract between him and the seller, though it formed a very important circumstance in the case, being an unequivocal act of possession and ownership as to the whole quantity sold on the part of the buyer. In like manner, as the taking 800 bushels of wheat out of the whole quantity sold, and then on board the ship, was holden to be in the case of *Stubey v. Heywood*, 2 *H. Bl.* 504. Without, therefore, touching the question which has been the main subject of argument in this case, and upon which my opinion at *nisi prius* principally turned, and without in any degree questioning the authority of the above mentioned two cases from the Common Pleas, this verdict may be sustained, on the ground that the weighing which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought. The verdict therefore must stand, and judgment be entered for the defendant.

HANSON
and Another,
Assignees, &c.
against
MEYER.

1805.

ROE, on the joint and several Demises of CECILIA WREN, *Tuesday,*
and of JOHN BACON, Clerk, and ISABELLA his WIFE, *July 2d.*
against CLAYTON.

IN ejectment for lands and tenements at *Elly-hill*, in the parish of *Haughton*, in the county of *Durham*, which was tried at the last summer assizes, a special verdict was found, stating, that one *Cuthbert Ellison*, being seised in fee of the premises in question, on the 20th of *June*, 1765, by his will duly executed and attested, devised as follows:—
“ I give and devise all my lands, tenements, and hereditaments at *Elly-hill* aforesaid, and all other my real estate whatsoever and wheresoever, to my said niece *Sarah Ellison* for life; and after the determination of that estate, I give and devise the same to *J. B.* and his heirs (to preserve contingent remainders, &c. &c.); and from and after the decease of my said niece *Sarah Ellison*, then to remain to the first son of my said niece *S. E.* and the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use of the second, third, fourth, fifth and all and every * other son and sons of my said niece *S. E.* the elder of such son and sons, and the heirs of his body lawfully issuing to be always preferred, and to take before the younger of such sons and the heirs of his body: and for default of such issue, then to the use of all and every of the daughter and daughters of my said niece *S. E.* and the heirs of their bodies lawfully issuing, to take as TENANTS IN COMMON; and for default of such issue, then to the issue of my sisters

Under a devise of all the devisor's lands to his niece *S. E.* for life, and after that estate determined, the same to trustees to preserve contingent remainders, and after her decease then to remain to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail; and for default of such issue then to the issue of the devisor's four sisters in such manner as he had limited the same to his niece's issue; and for default of such issue of his sisters to his own right heirs: held that, as by the limitation of all the

devisor's lands, which description runs through the subsequent remainders, it was his apparent intent that his estate should go over altogether, in default of issue of his niece, to the issue of his four sisters, and again that no part should go over to his right heirs, while there remained any issue of his sisters; therefore the devise is in effect to his niece *S. E.* for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainders (by implication) between those daughters; remainder to the issue of the four sisters of the devisor in tail: and one of the four sisters having issue a son and two daughters living at the death of the testator, at all events they took vested estates in remainder; and whether that son took conjointly with his two sisters in tail, or whether (as the issue of the devisor's four sisters were to take in such manner as was limited to the issue of the niece) the son would have taken first in tail, with remainder to his two sisters in tail, made no difference in the event, as the son died without issue. And the three other sisters of the devisor, and his niece *S. E.* having all died without issue after the death of the devisor; held, that the two surviving daughters of the fourth sister were entitled to all the estate against the devisee of the niece, who was the devisor's heir at law,

1805. *Susanna Swinburn, Isabella Wren, Barbara Ellison, and Jane Mills*, in tail, in such manner as I have limited the same to my said niece *Sarah Ellison's* issue, and for default of such issue, to remain to my own right heirs for ever." The testator also devised the rest and residue of his personal estate to his niece *Sarah Ellison*, whom he named sole executrix. The testator died seised on the 3d of *February*, 1776; and his niece *Sarah*, then *Sarah Smith*, widow (the person named *Sarah Ellison* in the will) being the only child and heir of *Robert Ellison* (who was the only brother of the said *Cuthbert* who died in the lifetime of the said *Cuthbert*) survived the testator, and was his heir-at-law. *Susanna Swinburn*, widow, *Isabella Wren*, widow, *Barbara Ellison*, spinster, and *Jane Mills*, widow, being the four sisters of the testator in his will named, also survived him. On the testator's death *Sarah Smith* entered into and became seised of the premises; and being so seised on the 3d of *August*, 1788, made her will duly executed and attested, and thereby devised all her estate and interest in the premises to the defendant in fee; and died on the 28th of *March*, 1801, without issue. *Susanna Swinburn* died on the 1st of *September*, 1781, without issue; *Jane Mills* died on 8th of *July*, 1800, without issue; and *Barbara Ellison* died on the 20th of *May*, 1801, unmarried and without issue.

[630] *Isabella Wren* died on the 1st of *July*, 1795, leaving issue *Cecilia Wren* and *Isabella Bacon* (two of the lessors of the plaintiff) the latter of whom intermarried with *John Bacon*, clerk, (the other lessor) her only daughters, and *Charles Wren* her only son and heir-at-law; which said *Cecilia Wren*, *Isabella Bacon*, and *Charles Wren* were living when the testator made his will. *Charles Wren* afterwards died on the 29th of *January*, 1799, without issue, leaving *Cecilia Wren* and *Isabella Bacon*, his sisters and co-heiresses at law; who on the death of *Barbara Ellison* became the co-heiresses at law as well of *Sarah Smith* as of the testator. The special verdict then stated, that after the deaths of *Sarah Smith*, *Susanna Swinburn*, *Jane Mills*, and *Barbara Ellison*, the defendant entered, claiming under the devise to him made by the will of *Sarah Smith*, into three undivided 4th parts of the premises; and concluded in the usual form.

This

This case was argued at much length by *Holroyd* for the Plaintiff, and *Richardson* for the Defendant; but the arguments turning principally on the intention of the testator, and the rules for raising cross remainders by implication, which have been so much discussed in several late cases; and as the Court, in giving judgment, adverted to the principal grounds of argument upon the intention of the testator to be collected from the will, and to the leading cases on the subject of cross remainders by implication, they need not be repeated.

1805.

ROE ex dem.
WREN & al.
against
CLAYTON.

LORD ELLENBOROUGH, C. J. The facts of this case, as they appear on the special verdict, are shortly these:—*Cuthbert Ellison* being seised in fee of the premises in question, and having a niece, *Sarah Ellison*, the daughter of a deceased brother, and having also four sisters, one of whom alone had issue, made his will, dated 20th June, 1765, and thereby devised his real estates as follows:—I give and devise *all* my lands, tenements, and hereditaments at *Elly-hill*, aforesaid, subject as aforesaid (that is, to a rent-charge of 50*l.* a year to his wife for life,) and *all* other my real estate whatsoever and wheresoever to my niece *Sarah Ellison*, for the term of her natural life; remainder to trustees to preserve contingent remainders; remainder to the 1st son of my said niece *Sarah Ellison* in tail; remainder to the 2d, 3d, 4th, 5th, and all and every other sons of my said niece in tail successively; remainder to all and every the daughter and daughters of my said niece in tail, as tenants in common; and for default of such issue, then to the issue of my sisters *Susanna Swinburn*, *Isabella Wren*, *Barbara Ellison*, and *Jane Mills* in tail, in such manner as I have limited the same to my said niece, *Sarah Ellison*'s issue; and for default of such issue, to remain to my own right heirs for ever." The testator died 3d February, 1776, leaving the said *Sarah Ellison*, his niece, his heir at law, who died on the 28th of March, 1801, without issue; having, by her will, devised all her estate and interest in the premises in question to *Nath. Clayton* the defendant, in fee. Two of the four sisters of the testator, namely, *Susanna Swinburn* and *Jane Mills*, died in the lifetime of the niece without issue; a third sister, *Barbara Ellison*, died after the niece, without issue; the fourth sister, *Isabella Wren*, died also in the lifetime of the niece; but left three children, viz. a son who died without issue in the lifetime

[631]

1805. lifetime of the niece, and two daughters, now living, who are lessors of the plaintiff, and who claim the estate under the devise of the will, limiting the remainder, for default of issue of the niece *Sarah Ellison*, to the issue of the testator's four sisters, "in such manner as he had before limited the same to his niece's issue." The question on this special verdict is, Whether the lessors of the plaintiff are entitled to any more, and how much more, than the one undivided 4th part of the estate of which they are in possession? On their part it has been contended, That they are entitled to the whole estate, 1st, On the ground that the will raises cross remainders between the issue of the several sisters of the testator, even supposing the sisters severally to have had issue, who had taken several 4th parts; and 2dly, Supposing such cross remainders cannot be raised, that the estate vested in the issue of the four sisters as a class (and not 1-4th in the issue of each sister;) and the issue of *Isabella Wren*, being the only issue in existence, the whole vested in them; and in that case, whether it vested in the son and daughters jointly, or first in the son alone, with remainder to the daughters, the lessors of the plaintiff are alike entitled to recover. For the defendant, it has been insisted, That there are not words in this will sufficient to raise cross remainders, even among the daughters of *Sarah Ellison* (though I think this part of the argument did not appear to be much relied on;) and that if the Court should think that cross remainders might be raised between the daughters of the niece, yet the words giving the estate over to the issue of the sisters, "in like manner as it had been before given to the issue of the niece," could not be construed to do more than raise cross remainders between the daughters of each sister, as to that portion which the issue of each sister should take; and not to carry on the cross remainders a stage farther, and raise them between the several classes of issue of the four sisters. That the fair construction of the will was this, To limit the estate, after failure of the male line of the testator's father's family, among the daughters' families; the family of each daughter to take 1-4th part in tail in the same manner as the niece's family was to take, that is, the sons successively in tail, and the daughters collectively in tail; and on failure of issue of any one of the testator's sisters, the fourth part given to the issue of that sister to go over to the testator's right heirs.

Under

Under which construction the defendant, as claiming under the heir at law of the testator, would be entitled to 3-4th parts, three of the sisters of the testator having died without issue; and, at all events, the defendant insisted on being entitled to 1-4th part, *viz.* that part which would have gone to the issue of *Barbara Ellison*, one of the sisters of the testator, if she had had issue; because she having outlived the niece, on whose death, without issue, the remainder to *Barbara Ellison's* issue was to take effect, and such remainder being, as he contended, a contingent remainder, and there not being any person in *esse* to take at the time the particular estate determined by the death of the niece, it would go of course to the heir at law of the testator: but on an attentive consideration of the will, as stated in his special verdict, it appears to us, that the plain intent of the testator, *Cuthbert Ellison*, was to give the whole of his real estate to his niece *Sarah Ellison* and her issue, in the manner limited by his will; and that no part should go over to the issue of his sisters till default of issue of his niece; which gave cross remainders among the daughters of the niece, if there should be any such daughters; and that for default of issue of his niece, the whole estate should in like manner go to the issue of his sisters; and that no part should go over to his own right heirs while there was any issue of any of his sisters. The testator, in the outset of the devise to his niece, gives all his lands, tenements, and hereditaments at *Elly-hill*, and all other his real estate whatsoever and wheresoever; and this is the subject of all the subsequent limitations,—the premises devised not being again repeated; so that it is the same as if he had repeated the word *all* in every limitation over. This was so held lately in *Watson v. Foxon*, 2 East, 36, where the testator had begun the devise by giving *all* that his farm and *all* the messuages, &c.; and after a limitation to the younger children of *Mary Foxon*, had, for want of such issue, devised the *SAID* premises over: and Lord *Kenyon*, in giving his judgment, says, “The devise over of the premises meant *all* the premises: he intended that *all* the estate should go over at the same time:” and in another place he says, “What he meant by the *said* premises is evident, and could not have been rendered clearer by saying *all* the said premises.” This brings it to a devise of *all* the testator’s estate to his niece for life;

1805.

ROE ex dem.
WREN & al.
against
CLAYTON,

[634]

1805.

Ex dem.
WREN & al.
against
CLAYTON.

[635]

remainder to her first and other sons successively in tail ; remainder to all and every her daughters in tail, as tenants in common ; and for default of such issue, then a devise of *ALL his said estate* to the issue of his four sisters, *in the same manner* as to the issue of his niece : and whatever doubts might have been entertained under the older cases, since the decision of *Wright v. Holford*, (a) *Phlipard v. Mansfield*, (b) *Atherton v. Pye*, (c) and the case which I lately mentioned of *Watson v. Foxon*, (d) it seems perfectly clear that there would have been cross remainders among the daughters of the testator's niece, *Sarah Ellison*. This brings us to consider the effect of the limitation *to the issue of his four sisters in tail in such manner as he had before limited the same to the issue of his niece* ; and for default of such issue to remain to his own right heirs. The premises limited are never repeated after the first mention of them in the devise to the niece, where the testator gives *all his estates* ; those words are therefore carried forward to every subsequent limitation ; and it is the same as if the testator had said, " And for default of such issue of my four sisters, *all* my said estates to remain to my own right heirs ; that is, I mean that all my estate shall be enjoyed by the issue of my four sisters, so long as there are any such ; and in default of such issue, *all* to go over together to my own right heirs : "—and this appearing to us to be the clear intention of the testator on the face of his will, it does not seem necessary to consider in what manner the issue of the several sisters would have taken, if they had all had issue : but as far as that may be material to the determination of the present case, in the events which have happened, we think that the estate was vested in the issue of the sister *Isabella Wren*, who were also living at the death of the testator. Whether in *Charles Wren* and his sister jointly, or in *Charles Wren* in tail, remainder to his sister in tail, makes no difference ; as in either case, on his death, his sisters, who are the lessors of the plaintiff, became entitled. On these grounds we are of opinion, That the plaintiff is entitled to recover the 3-4th parts of the estate in question, sought by this ejectment. The consequence is, that judgment must be for the plaintiff.

(a) Cowp. 31.

(b) Cowp. 797.

(c) 4 Term Rep. 710.

(d) 2 East, 36.

AN

INDEX

TO

THE PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. The owner of land, through which a river runs, cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other land-owner lower down the river, who had at any time before such enlargement, appropriated to himself the surplus water, which did not escape by the former channel. *Bealey v. Shaw*, II. 45 G. 3. 208
2. In *Prescott v. Phillips*, it had been ruled by *Adair*, Serjt. Chief Justice of *Chester*, in 1798, That nothing short of a 20 years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above 19, but short of 20 years, was not sufficient. Cited. *ib.* 213
3. An action on the case lies for criminal conversation with the plaintiff's wife, notwithstanding a deed, making certain provisions for the wife, in case of future separation, with the approbation of trustees; the deed containing a proviso in case of such separation, for the attendance and care of the mother to her children, whereby the husband did not

- give up all claim to the comfort and assistance of the wife. (Vide *Husband and Wife*, No. 1.) *Chambers v. Caulfield*, H. 45 G. 3. 244
4. Where the plaintiff complained of a plea of *trespass*, for that the defendant, with force and arms, assaulted and seduced the plaintiff's wife, whereby he lost the comfort of her society, &c. against the peace, &c. to his damage, &c. whether this be *trespass* or *case* (and former authorities have considered it to be *case*) at any rate a plea of not guilty *infra sex annos* is good on general demurrer. *Macfadzen v. Olivant*, E. 45 G. 3. 387
 5. An action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold; alleging, That the defendant intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll, is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiff's claim of toll, coupled with the fact of not paying the toll on demand afterwards, when the corn was delivered to the defendant in the same borough, but
212 out

out of the market; for non constat, that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market, and there sold. The Bailiffs, &c. of Tewkesbury v. Diston, B. 45 G. 3. 438

ADMINISTRATOR.

A count, upon a promise to the plaintiff as administratrix, for goods sold and delivered by her after the death of the intestate, may be joined with a count upon an account stated with her as administratrix; for the damages and costs when recovered would be assets. *Mathew Cowell and Jane his Wife, Administratrix of Bowes v. Waters, E. 45 G. 3.* 405

AGENT,

See *Navy Agent; Principal and Factor; Stopping in Transitu, No. 1.*

AGREEMENT

- To controul Master Manufacturers,
See *Conviction, No. 1.*
- To employ Agent for a certain Time,
See *Bond, No. 1.*
- For a Lease,
See *Lease, No. 2.*
- For Sale of Land,
See *Assumpsit, No. 3.*
- For Fire Insurance,
See *Fire Insurance.*
- For Purchase of Goods,
See *Frauds, Stat. of No. 1.*
- For Purchase of standing Crop of Grass by Parol,
See *Frauds, Stat. of No. 2.*

Under a contract of sale whereby the

vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at so much *per cwt.* by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and 14 days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to *weigh and deliver to the vendee all his starch: held, That under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part-delivery upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse, in the name and at the expence of the vendor. Hanson and Another, Assignees of Wallace and Hawes, Bankrupts, v. Meyer T. 45 G. 3.*

614

ANNUITY.

Where the grantor of an annuity applied to have it set aside on motion, and to vacate a judgment which had been irregularly entered up on a warrant of attorney, which was given for entering up judgment on a bond in another court to secure the annuity, and which warrant of attorney was improperly described in the memorial; and the Court accordingly set aside the judgment: held, That the grantee might recover back the consideration money in *assumpsit*, and was not put to his action on a bond, which was also given for securing the annuity, and which bond was not ordered to be cancelled, though voidable in pleading, by virtue of the Annuity Act. *Scurlfield v. Gowland, H. 45 Geo. 3.*

241

APPEAL.

APPEAL.

1. The stat. 42 G. 3. c. 90. s. 61. enables a magistrate to make an order for payment of servants' wages in certain cases; and directs, that in case of *refusal or non-payment* of any sum so ordered for 21 days after such determination, he may issue his warrant of distress; but it gives an appeal to the Sessions: held that 21 days having elapsed between the making of such order before the appeal, and also 21 days after such appeal dismissed before the warrant of distress issued, the magistrate was warranted in issuing such order of distress, without proof of any demand, subsequent to the appeal. *Wotton v. Harvey*, Clerk, II. 45 G. 3. 75
2. There lies no appeal to the Sessions from a conviction by two justices, upon the stat. 42 G. 3. c. 38. s. 30. for wetting corn in a certain stage of the process of malting; for the clauses of appeal in former excise laws, to which there is a general reference in this Act, extend not to convictions for *penalties* by two justices. *Rev v. Skone*, T. 45 G. 3. 514

APPRENTICE,

See *Impressing*.

ASSAULT,

See *Pleading*, No. 4.

ASSUMPSIT,

See *Fire Insurance*; *Joinder in Action*, No. 1.

1. Where the grantor of an annuity applied to have it set aside on motion, and to vacate a judgment which had been irregularly entered upon a warrant of attorney, which was given for entering up judgment on a bond in another court to secure the annuity, and which warrant of attorney was properly described in the memorial; and this Court accordingly set aside the judgment: held, that the grantee might recover back the consideration money in *assumpsit*, and was not put to his action on a bond which was also given for securing the annuity; and which bond was not ordered to be cancelled, though voidable in pleading by virtue of the Annuity Act. *Scurfield v. Gowland*, II. 45 G. 3. 241
2. An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick at the time of sale, with the privity of the auctioneer; but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down; nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the Acts of the 19 G. 3. c. 56. and 28 G. 3. c. 37;—but being asked at the sale, Whether he had taken the proper precautions to avoid the duty in case there were no sale?—he said, That it was his mode to fix a price under the candlestick; and if the bidding did not come up to that price, it was *no sale or duty*: held, That the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner; he having in effect warranted that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken in the law. *Cupp v. Topham*, E. 45 G. 3. 392
3. In *assumpsit*, by the vendor against the vendee of land, for not accepting it and paying the purchase-money, the plaintiff averred, That he was *seised in fee* of the land; and that the defendant agreed to purchase it *on having a good title*; and that his title to the land was made good, perfect, and satisfactory to the defendant; and that he, the plaintiff, had been always *ready and willing*, and

and offered to convey the lands to the defendant, but that the defendant did not pay the purchase-money; and, on demurrer, held, That such general allegation of title in the plaintiff, and that his title was made good and satisfactory to the defendant, and that the plaintiff was ready and willing, and offered to convey to the defendant, were a sufficient performance of the agreement on his part to entitle him to recover for a breach of the defendant's part in not paying the purchase-money. *Martin v. Smith*, T. 45 G. 3. 555

4. In declaring upon a contract, not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the Act, and the entire Act or duty which is to be done (including the time, manner, and other circumstances of its performance) in virtue of such consideration; the breach of which act or duty is complained of: but part of the contract, which respects only the liquidation of damages, after a right to them has accrued by a breach of the contract, is not necessary to be set forth in the declaration, but is only matter of evidence to be given to the jury in reduction of damages. *Clarke v. Gray*, and *Marsden v. Gray*, Trin. 45 G. 3. 564

5. Therefore, *assumpsit* may be maintained in the common form of declaring against a carrier for the loss of goods, which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract, proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, That the carrier would not be accountable for more than 5*l.* for goods, unless entered as such, and paid for accordingly. *ib.*

ATTORNEY.

The Court refused to proceed summarily against a steward, who was an at-

torney, to compel him to account before the Master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and to deliver up upon oath all deeds, writings, &c. relative to the estate, this being the proper subject of a bill in equity, and not a case for a *mandamus* to compel a steward of a manor to deliver up court-rolls, &c. in lieu of which this summary mode of proceeding has been adopted, where the steward of the court is an attorney. *Cocks v. Harman* E. 45 G. 3. 404

AUCTIONEER.

An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the Acts of the 19 G. 3. c. 56, and 28 G. 3. c. 37; but being asked at the sale, Whether he had taken the proper precautions to avoid the duty in case there were no sale?—he said, That it was his mode to fix a price under the candlestick; and if the bidding did not come up to that price, it was *no sale or duty*: held, That the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner, he having in effect warranted that proper precaution had been taken to prevent the duty attaching in the event, though both parties were mistaken in the law. *Capp v. Topham*, E. 45 G. 3.

392

AWARD.

AWARD.

After an award made under the hand of an umpire, and ready for delivery, pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the award, is void; but the award is good for the original sum awarded, which was still legible,—the same as if such alteration had been made by a mere stranger, without the privity or consent of the party interested. *Henfree v. Bromley*, E. 45 G. 3. 309

BAIL.

The Court will enter an *exoneretur* on the bail-piece, on payment of the sum sworn to and costs, though less than the sum acknowledged to be due, as well where the action is by original as by bill. *Jacob v. Bowes*, E. 45 G. 3. 312

BANKRUPT.

See *Ship Register Acts*, No. 1.

1. *B.* a trader in London, ordered goods to be shipped to him by *D.* and Co. his correspondents at Dantzic, who were to draw for the amount on *F.* at Hamburg (who had agreed to accept the bills upon receiving commission on the amount:) and the bills of lading and invoices were to be transmitted by *D.* and Co. from Dantzic to *F.* at Hamburg, who was to forward them to *B.* in London; and *F.* accordingly accepted the bills of exchange drawn upon him; and, on the receipt of the bills of lading, transmitted the same (which were made out to the order of the shippers, and not indorsed) to *B.* in London, who received them, together with the invoices and letter of advice, five days after an act of bankruptcy committed by him. *F.* also became bankrupt; and the bills of exchange drawn on him by *D.* and Co. were obliged to be taken up and paid by themselves: held, 1st. That *F.* had no right to stop the goods in transitu; being no more than a surety for the price, and not vendor or consignor;—2dly, That one, who was general agent of *F.* in London, having obtained the bills of lading from the bankrupt after his bankruptcy, upon an agreement, when the goods arrived, to dispose of them, and to apply the net proceeds to the discharge of such bills as had been drawn against the goods, had no authority to retain the proceeds against the assignees of *B.* the bankrupt, either in respect of *F.* or in respect of a stopping in transitu on behalf of *D.* and Co. the shippers, who, after his possession of them, and after trover commenced by *B.*'s assignees for the value sent a letter to him, approving of his having obtained possession of the bills of lading and the goods; for at any rate, there was no adverse stopping in transitu, but the goods were obtained by agreement with the vendee after his bankruptcy, even if the defendant could be considered as agent for the shippers at the time by relation. *Siffken and Feize, Assignees of Broune, a Bankrupt, v. Wray*, E. 45 G. 3. 371
2. The general plea of bankruptcy, and the certificate given by stat. 5 G. 2. c. 30. s. 7. may be pleaded, without averring that the bankruptcy happened before the commencement of the suit: but if it appeared *ad nisi prius* that it happened after the action brought it seems that the defendant could not avail himself of the defence under such a general plea, which is only given by the statute, in case any bankrupt who was conformed to the law shall afterwards be arrested or impleaded for any debt due before such time as he became bankrupt. *Tower v. Cameron*, E. 45 G. 3. 413

BASTARD.

1. The stat. 6 Geo. 2. c. 31. only authorizes parish-officers to take security from the putative father of a bastard child to indemnify the parish; and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum to the amount of the charge actually sustained by the parish, which tender was found for the defendant: held, That the plaintiffs could not recover further upon the note. *Cole v. Gower*, *Hil.* 45 G. 3. 110
2. And where, in an action on such a promissory note, it appeared that the parish had been indemnified: held, That the defendant was entitled to a verdict. *Wild v. Griffin*, sittings after *Trin. Term at Westminster*, cor. *Ld. Ellenborough*, *C. J.* ib. 114

BEDFORD LEVEL
CORPORATION.

The stat. 13 Car. 2. c. 17. creating the corporation of the *Bedford Level*, directs, That they shall appoint a registrar, &c. and other officers at their pleasure; the duty of which registrar is to register titles to land within the Level; and he takes an oath of office: held, 1st, That an information in nature of *quo warranto* does not lie against such an officer, he being a mere servant of the corporation, and his office not affecting any franchise or other authority holden under the crown; and the corporation having at the request of the registrar elected a deputy registrar,—held, 2dly, That the latter officer must be considered as much a deputy of the principal registrar as if nominated by him;—3dly, That, however such deputy were properly or not constituted in the first instance, yet his authority necessarily expired on the death of his principal;—4thly, That however the acts of a legal deputy to a ministerial officer may be good af-

ter the death of his principal, before notice thereof to those who are interested in his acts, as being done under a colour of authority, yet that the titles of land-owners within the Level, registered by the deputy after the death of his principal was known, were invalid;—5thly, That the persons whose titles were so illegally registered, had no authority under the Act of Parliament to vote at the election of a new registrar;—6thly, That upon affidavit that one of two candidates for the office had a majority only by means of such illegal votes, the Court granted a *mandamus* to the corporation to admit and swear the other, who appeared upon the affidavits to have the greater number of legal votes; and this, although the first was admitted and sworn into the office, there being no other specific, or at least no other such convenient mode of trying the right. *Rex v. The corporation of the Bedford Level*, *E.* 45 G. 3.

356

BILLS OF EXCHANGE, AND
PROMISSORY NOTES.

1. Where notice of the dishonour of a bill of exchange, by the acceptor in *London* was sent by the post to the holder in *Manchester*, where the letter was delivered out between eight and nine o'clock in the morning, and the post went out for *Liverpool*, where the drawer lived, between 12 at noon and one, and the holder did not send notice to the drawer by the post either of the same day or the next, but sent it in a letter by a private person on the latter day, who did not deliver it to the drawer till two hours after the post delivery, and only about one hour before the post left *Liverpool* for *London*, whereby the drawer was so agitated that he could not write in time for that day's post to *London*: held, That at all events the holder had made the bill his own by his laches; for whether reasonable notice be a question of law or fact, or whether the general rule of law require notice

- notice of the dishonour of a bill to be sent to a party living at another place by the *next* post after it is received (by which must be understood the next practicable post in point of time and distance ;) and whether four hours between the coming in and going out of the post be a sufficient interval in point of practical convenience to receive the notice and to prepare a letter of advice to the drawer ; at all events the holder ought to have written by the *post* of the *next* day after notice received by him ; and ought not to have *delayed the receipt of notice by the drawer* until after the arrival of the *next post*, by sending the letter by a private hand. *Darbishire and another v. Parker, Hil. 45 G. 3.* 3
2. Where a bill of exchange passed through the hands of five persons, all of whom lived in *London* or the neighbourhood, and the bill, when due, being dishonoured, the holder gave notice on the same day to the 5th indorser, and he, on the next day, to the 4th, and he, on the next day, to the 3d, and he, on the next day, to the 2d, and he on the same day to the 1st,—the Court were of opinion, on a case of finding these facts, That due diligence had been used ; and Lord *Kenyon* thought that the question of *due diligence* was proper to be left to the jury ; on which the other judges gave no opinion. *Hilton v. Shepherd, E. 36 G. 3.* 11
3. *Dubitatur* by Lord *Kenyon*, Whether the question of *reasonable notice*, as to the dishonour of a bill of exchange, be not a question of fact to be submitted to the jury under all the circumstances of the case ? But though the holder may have lost his remedy by laches, in not giving notice against the drawer (and such notice given by the drawee to the drawer the next day will not suffice for notice by the holder ;) yet a subsequent promise to the holder by the drawer, that he will see the bill paid, will support an *assumpsit*. *Hopes v. Alder, M. 40 G. 3.* 16
4. The stat. 6 Geo. 2. c. 31, only authorizes parish-officers to take security from the putative father of a bastard child to indemnify the parish ; and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum, as the amount of the charge actually sustained by the parish, which tender was found for the defendant : held, That the plaintiffs could not recover further upon the note. *Cole and Others v. Gower, H. 45 G. 3.* 110
5. And where the parish were entirely indemnified, there was a verdict for the defendant on such a note. *Will v. Griffin*, sittings after *Trin. 1804*, cor. Lord *Ellenborough*, C. J. *ib.* 114
6. Whether or not an acceptance of a bill, once made by the drawee, may be cancelled or recalled by him before the bill be delivered back to the holder ; at all events, if the acceptance be so cancelled, and the holder cause the bill to be noted for non-acceptance, he cannot afterwards sue upon it as an acceptance. *Bentineck v. Dorrien, H. 45 G. 3.* 199
7. Lord *Kenyon* is said to have decided, That an acceptance once made could not be revoked. *Tummer v. Oddie*, sittings after *Easter, 1800.* *ib.* 200

BILL OF LADING,]

See *Principal and Factor*, No. 1 ; and the case of *Lickbarrow v. Mason*, in Dom. Proc. as to the negotiability of bills of lading. 21

BOND,

See *Assumpsit*, No. 1.

1. The condition of a bond, reciting, That the defendant had agreed with the plaintiffs " to collect their revenues from time to time for 12 months," and afterwards stipulating that, " at all times thereafter, during the continuance of such his employment, and for so long as he should

should continue to be employed, he would justly account and obey orders," &c. confines the obligation to the period of 12 months named in the recital. *The Company of Proprietors of the Liverpool Water-works v. Atkinson and Harpley*, Trin. 45 G. 3. 507

2. A bond, conditioned for the payment of a certain sum by instalments, is within the stat. 8 & 9 W. 3. c. 11. s. 8; and after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a *scire facias* to revive it. *Willoughby v. Swinton*, T. 45 G. 3. 550

3. In debt on bond, conditioned to perform an award, the plaintiff must assign a breach under the statute 8 & 9 W. 3. c. 11. and cannot have judgment for the penalty, and take out execution for the single sum awarded, though the measure of damages be ascertained by the award. *Welsh v. Ireland*, T. 45 G. 3. 613

BRIDGE.

- A. grants liberty, licence, power and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll: the property in the materials of the bridge, when built and dedicated to the public, still continues in B. subject to the right of passage by the public; and when severed and taken away by a wrongdoer, he may maintain trespass for the asportation. *Harrison v. Parker*, II. 45 G. 3. 154

CANCELLATION.

See *Bills of Exchange*, No. 6; *Lease*, No. 1; *Ship Register Acts*, No. 1.

CARRIER,

See *Common Carrier*.

CHARITABLE USES,

Devisee, No. 3.

CHASING,

See *Insurance*, No. 2.

CO-HEIRS,

See *Entry*, No. 3, 4.

COMMON CARRIER.

1. The lien of a common carrier for his general balance however it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by clear and satisfactory instances sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm; yet it is not to be favoured, nor can be supported by a few recent instances of detention of goods by four or five carriers for their general balance: but such a lien may be inferred from evidence of the particular mode of dealing between the respective parties. *Rushforth and Another, Assignees of B. and W. Rushforth, v. Hadfield*, T. 45 G. 3. 519
2. *Assumpsit* may be maintained in the common form of declaring against a carrier for the loss of goods, which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract, proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, That the carrier would not be accountable for more than 5*l.* for goods unless entered as such, and paid for accordingly. *Clarke v. Gray*, and *Marsden v. Gray*, Trin. 45 G. 3. 564

Vide *Pleading*, No. 8.

COMMON

COMMON INFORMER,

See *Indictment*, No. 2.

COMPOUNDING
PUBLIC PROSECUTION,

See *Indictment*, No. 1, 2, 3, 4.

CONDITION.

See *Devise*, No. 1.

1. A condition against alienation, except to sisters or their children, annexed to a devise to two and their heirs, is good; and for a breach of it by one of them, in levying a fine of her moiety to the use of her husband in fee, the heir of the deviser, (the remainder, on non-performance of the condition, not being disposed of by a general residuary clause) may enter on such moiety. *Doe d. Gill and Wife v. Pearson*, II. 45 G. 3. 173
2. One of several co-heirs of the deviser may enter for non-performance or breach of such condition, and recover her own share in ejectment. *ib.*

CONSIGNOR,

See *Stopping in Transitu*.

CONVERSION,

See *Trover*.

CONVEYANCE,

See *Fraudulent Conveyance to Defeat Creditors*.

Where an estate was conveyed to a trustee, *habendum* to him and his heirs, to the use of such person and for such estate as *W.* should by deed, &c. appoint, and for want of such limitation to the use of *W.* and his heirs, and the same conveyance reserved a certain fee-farm rent to the chief lord, and contained a covenant by *W.* his heirs and assigns, for the payment of it: held, That *W.* took a *vested*

fee, liable to be *divested*, by the execution of his power of appointment; and *W.* having contracted to sell the estate, afterwards by indentures of *lease and release*, to which he and his trustee were parties, after reciting the former conveyance, *the trustee*, by direction of *W.* did grant, bargain, sell, and release, and *W.* did grant, bargain, sell, alien, *release*, ratify, and confirm, and also direct, limit, and appoint to the purchaser and his heirs all their estate, title, interest, use, trust, &c. in law and equity, subject to the reserved rent, and to the performance of covenants on the part of *W.* to be performed; and the purchaser also covenanted with *W.* to pay the said rent, and to *indemnify and save him harmless*: held, That the purchaser took the estate by the *appointment* of, and not by *conveyance* from *W.*; the instruments (a lease and release) though more commonly and properly adapted to pass an interest, and containing words of grant for that purpose, yet professing in terms to be an *appointment*; and the trustee having joined in it by the direction of *W.* which was unnecessary, if it had been intended that the purchaser should take an estate derived only out of the interest of *W.* and it being obviously for the benefit of the purchaser to take by appointment, and such appearing upon the whole to have been the intention of the parties; and held, in consequence, That the defendant (the heir, devisee, and executor, of the purchaser) was not liable in covenant for rent in arrear, either as executor, or assignee of land, which was not bound in the hands of *W.*'s appointee by *W.*'s covenant. *Roach v. Wadman*; and *the same v. the same*, *Executor of Wadman*, II. 45 G. 3. 289

CONVICTION.

The stat. 39 & 40 G. 3. c. 136. enacts, That all *agreements*, &c. in writing or not, by any journeyman manufacturers, for *controlling* any person carrying on any manufacture, &c. in the conduct thereof

thereof, &c. shall be illegal : and it gives a summary form of conviction, in which the offence is required to be stated : held, That a conviction, alleging generally, that the defendants were concerned in entering into " a certain agreement for the purpose of controlling A. B." &c. without stating what the agreement was (even if a departure from the words of the statute in stating the agreement to be for the purpose of controlling, &c. instead of for controlling, &c. would not at any rate have been a fatal variance) was bad. *Rex v. Nield and Others*, *E.* 45 G. 3. 417

COPARCENERS,

See *Entry*, No. 3, 4.

COPYHOLD.

1. The lord may recover from a copyholder the fine assessed by him on admittance, not exceeding two years' value of the tenement, although there be no entry of the assessment of such fine on the court-rolls ; but only a demand of such a sum for a fine, after the value of the tenement had been found by the homage. *Lord Northwick v. Stanway*, *Hil.* 45 G. 3. 56
2. A *mandamus* lies to the lord and steward of a manor to admit one to a copyhold tenement who has a *prima facie* legal title, in order to enable him to try his right, though equity had before refused to compel the lord to admit him for want of his shewing an equitable right to the property ; but if there be a claim of a previous fine due to the lord, in respect of the ancestor, from whom the party claims, the rule will only be granted on payment of such fine or fines as shall be due. *Rex v. Coggan and Another*, *East*, 45 G. 3. 431
3. A *mandamus* was just before granted to the Duke of Leeds, to admit Mr. Conolly to certain customary tenements in the manor of Wakefield, in

Yorkshire, in order to enable Mr. Conolly to try his title to them, *Rex v. Coggan and Another*, *East*, 45 G. 3. 432

4. Devisees of a copyhold, holding as tenants in common, have several estates to which they must be severally admitted, and for which several services are due to the lord, and several heriots on the death of each tenant ; and the multiplication of heriots and fees on admission still continues, notwithstanding the re-union of the same land afterwards in one person,—the estates or interests in the land, once divided in severalty, continuing several. *Attree v. Scutt*, *E.* 45 G. 3. 476

CORN STANDING.

1. Where one devised a farm in his own occupation in his mother for life, remainder to G. in tail ; and also devised to his mother " all his goods and chattels, stock of his farm, bonds, &c. and all other his moveables whatsoever," and made her executrix : held, That growing corn, which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to G. the devisee of the land. *Cox v. Godsalve*, 11 W. 3. 604
2. Agreement for purchase of standing crop. See *Frauds*, *Stat. of*, No. 2.

CORPORATION,

See *Deputy*, No. 1, 2 ; *Mandamus*, No. 1 ; *Quo Warranto*, No. 1.

Upon affidavit, that one of the candidates for an office had a majority only by means of illegal votes, the Court granted a *mandamus* to the corporation to admit and swear the other, who appeared upon the affidavits to have the greater number of legal votes ; and this, although the first was admitted and sworn into the office, there being no other specific, or at least no other such convenient mode of trying the right. *Rex v. The Corporation*

ration of the Bedford Level. East, 45
G. 3. 356

COVENANT,

See *Poor Relief*, No. 3.

Where *A*, having a vested fee, liable to be invested by his own execution of a power of appointment, and the deed whereby the estate was conveyed to his trustee contained a covenant by *A*. his heirs and assigns, for payment of a fee-farm rent to the chief lord; and he afterwards executed the power by *appointment* to a purchaser in fee, subject to the reserved rent, and to the performance of covenants on the part of *A*. to be performed; and the purchaser also covenanted with *A*. to pay the said rent, and to *indemnify and save him harmless*;—yet held, That the heir, devisee, and executor of the purchaser was not liable in covenant for rent in arrear, either as executor, or as assignee of the land, which was not bound in the hands of *A*'s appointee by *A*'s covenant. *Rouch v. Wadham*, *Hil.* 45 G. 3. 289

CRIMINAL CONVERSATION,

See *Husband and Wife*, No. 1, 2,

CRUIZING,

See *Insurance*, No. 2.

DAMAGES, EXCESSIVE,

See *New Trial*, No. 1.

DEATH.

The presumption of death arises, in the absence of all other evidence, after seven years from the time when a person was last known to be living. *Doe v. Jesson*, *Hil.* 45 G. 3. 85

DEBT.

Debt lies for use and occupation generally, without stating the place where the premises lie, or any of the particulars of the demise. *King v. Fraser*, *East*, 45 G. 3. 348

DECLARATIONS,

See *Evidence*, No. 2.

DEED,

See *Bond*.

1. Where a deed cancelled in fact may be set up again. *Vide Lease*.
2. After an award made under the hand of an umpire, and ready for delivery, pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the award, is void; but the award is good for the original sum awarded, which was still legible, the same as if such alteration had been made by a mere stranger, without the privity or consent of the party interested. *Henfree v. Bromley*, *E.* 45 G. 3. 309

DEMAND OF MONEY.

The stat. 42 G. 3. c. 90. s. 61. enables a magistrate to make an order for payment of servants' wages in certain cases; and directs, that in case of *refusal or non-payment* of any sum so ordered for 21 days after such determination, he may issue his warrant of distress; but it gives an appeal to the Sessions: held, That 21 days having elapsed between the making of such order before the appeal, and also 21 days after such appeal dismissed before the warrant of distress issued, the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal. *Wootton v. Harvey*, *Clerk*, *H.* 45 G. 3. 75

DEPUTY

DEPUTY.

The stat. 15 Car. 2. c. 17. creating the corporation of the *Bedford Level*, directs, That they shall appoint a registrar, and other officers at their pleasure; and the corporation having, at the request of the registrar, elected a deputy registrar,—held, That the latter officer must be considered as much a deputy of the principal registrar as if nominated by him; and that however such deputy were properly or not constituted in the first instance, yet his authority necessarily expired on the death of his principal. *Rex v. The Corporation of the Bedford Level, East*, 45 G. 3.

356

However the acts of a legal deputy to a ministerial officer may be good, after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a colour of authority; yet the titles of land-owners, within the *Bedford Level*, registered by the deputy after the death of his principal was known, were holden to be invalid; and that the persons, whose titles were so illegally registered, had no authority under the Act of Parliament to vote at the election of a new registrar.

ib.

DEVISE.

One devised lands to trustees in fee (subject to the uses of a certain term of 1000 years) to the use of *W. H.* for life, second son of the devisor's daughter, Lady *E.* subject to the proviso after mentioned, remainder to trustees to preserve contingent uses during *W. H.*'s life, but to permit him to take the rents, &c.; and after his decease, to the use of his first and other sons successively in tail male, subject to the same proviso, &c.; and in default of such issue, remainder to the use of the third and other sons of Lady *E.* successively in tail male, subject to the same proviso,

&c.; and in default of such issue, with like remainders to the second son of Lady *E.*'s eldest son, &c. and in default of such issue, to the use of the devisor's grand-daughter *C. H.* for life, subject to the proviso, &c.; remainder to trustees to preserve contingent uses, &c.; remainder to the use of her first son (the plaintiff) in tail male, with other remainders over,—all subject to the same proviso; which was, That "if *W. H.* or either of the persons to whom the estate was limited, should become Earl of *E.* the use limited to such person and his issue male should cease and be void, as if such person were dead without issue of his body." The devisor's daughter, Lady *E.* at the time of his death had only two sons, her eldest (afterwards Lord *E.*) and the said *W. H.* but she had afterwards a third, who died under age; and the said *W. H.* was let into possession at twenty-three, and had one son;—and held, That on the death of his eldest brother without issue, by which event *W. H.* became Earl of *E.* the plaintiff, who was then next in remainder, supposing *W. H.* had in fact died without issue, was entitled under the will to take an estate in tail male in possession, subject to the trusts of the term of 1000 years. *William Holwell Carr, an infant, v. The Earl of Errol, H.* 45 G. 3.

58

2. One having real and personal estates gave by his will several legacies and annuities, which he directed to be paid by his executrixes out of his real and personal estates, which he charged therewith, and then devised certain lands in *Y.* to *A.* and *H.* (two out of five daughters which he had) and their heirs, as tenants in common, on condition that, in case they or either of them should have no issue, they or she having no issue, should have no power to dispose of her share, except to her sister or sisters, or their children; and he devised all the rest and residue of his real and personal estates to *A.* and *H.* in fee, whom he made his executrixes. On his death, *A.* and *H.* entered, and afterwards *A.* levied

levied a fine of her moiety to the use of her husband in fee, and died:—held, That the *condition against alienation*, except to sisters or their children, annexed to the devise to *A.* and *H.* and *their heirs*, was good; and that for the breach of it by *A.* in levying such fine, the heirs of the deviser might enter on her moiety, it being a remainder undisposed of by the residuary clause, which was only intended to operate upon such things of which no disposition had been made by the will, and not contemplating the devise over of the respective moieties of the daughters on non-performance of the condition;—and held, That one of the several co-heirs of the divisor might enter for non-performance or breach of the condition, and recover her own share in ejectment: for that where the entry upon a claim by one of several coparceners, who make but one heir, is lawful, such entry, made generally, will vest the seisin in all as the entry of all. *Doe d. Gill and Wife v. Pearson*, *III.* 45 *Geo.* 3.

173

3. A devise to trustees of a reversion in land (after payment of debts, &c. which were found to be paid) to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should from time to time think fit to apply the same, is not a devise to charitable uses within the stat. 9 *G.* 2. c. 36; and therefore held, That the trustees were entitled to recover at law, however the Court of Chancery might afterwards direct the application of the trust-fund. *Doe d. Toone and West v. Copestake*, *E.* 45 *G.* 3.

328

4. Under a devise to *D. O.* the testator's eldest son, for life; remainder to trustees, &c.; remainder to the first and other sons of his said eldest son and *their heirs*; and for want of such issue to the testator's second son *J. O.* &c. with like remainders to his first and other sons; and for want of such issue, to the testator's own right heirs: held, That the first and other sons of *D. O.* the eldest

son took estates *tail, in succession*; and consequently the remainders over vested, and were not contingent and defeated upon the event of *D. O.*; having a son, who died in the lifetime of *D. O.* and therefore that *D. O.* having died without any son living at his death, but leaving daughters, a son of *J. O.* was entitled to take, in preference to such daughters of his elder brother. *Lewis d. John Ormond v. Waters*, *E.* 45 *G.* 3.

336

5. Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context. As where a testator having two sisters, *H.* and *J.* and also two infant cousins, *T.* and *G.* the maintenance and education of which latter he recommended to his executrix and residuary legatee, devised his estate at *A.* to his sister *H.* for life; remainder to his sister *J.* for life; remainder to his cousin *T.* in tail; remainder to his cousin *G.* in tail, &c.; remainder to his own right heirs:—and then devised another estate at *B.* “to his sister *J.* for life, or if she should survive his sister *H.* so that she should come into possession of the estate at *A.*” then to *L. J.* (whom he made executrix and residuary legatee) for life, towards the support, &c. of his cousins *T.* and *G.* remainder to the said *G.* in fee: held, That as the word *or*, so placed, was unintelligible; being referable to no other alternative to give it effect; and as it was apparent from the whole context that the testator had in contemplation another alternative, namely, the death of his sister *J.* and that he meant to make a provision after the death of his sisters for his cousin *G.* as well as his cousin *T.* which was not satisfied by only giving *G.* a remainder in tail AFTER a remainder in tail to his brother *T.*,—therefore in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the will should be read as if he had devised his estate at *B.* to “his sister *J.* for life, and after her death, or, if

- if she should survive his sister *H.* so that, &c. then," &c. and consequently *G.* took a *vested remainder* in the estate at *B.* to which he became entitled in possession after the death of the testator's sisters and *L. J.* his executrix, although his sister *J.* did not survive his sister *H.* *Doe. d. George Leach v. Micklem, E. 45 G. 3.* 486
6. *A.* being possessed of lands at *L.* which had been settled on his marriage on himself for life; remainder to his wife for life, for her jointure, remainder to the heirs of their bodies; with reversion in fee to himself; and having other lands at *P.* and *Q.* settled to the same uses (except a coppice, part of *Q.* of which coppice, as well as of some other lands, he was seised in fee) after the death of his wife, and having only two daughters living, devised to his daughter *J.* in tail his unsettled estates by name, and *all other* his freehold, copyhold, and leasehold lands, which he was possessed of or entitled to, and which were not settled in jointure on his late wife (except *the coppice*, which he directed should always be held with his estate at *P.*) she, his said daughter, and the heirs of her body, paying out of all the aforesaid lands a certain annuity unto his other daughter *A. M.* for life; and in case his said daughter *J.* should die and leave no issue, then to his other daughter *A. M.* for life, remainder to her children, charged, &c. remainder to his nephew in fee;—held, that the *reversion* of the *settled* lands did not pass by the will, but were excepted out of the general clause by force of the *restrictive* words, "and which are not settled in jointure," &c.; not only by the natural import of those words, but because of the incongruity of imputing to the deviser an intention of devising estates *tail* and *for life* to his daughters in lands, which were before settled on them in *tail general*; though it did not appear that the testator had any other real estate on which the general clause could operate, except the reversion of the settled lands. *Goodtitle d. Daniel v. Miles, E. 45 G. 3.* 494
7. Where one devised a farm in his own occupation to his mother for life, remainder to *G.* in tail; and also devised to his mother "all his goods and chattels, stock of his farm, bonds, &c. and *all other his moveables whatsoever*," and made her executrix: held, That growing corn, which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to *G.* the devisee in remainder of the land. *Cox v. Godsalve, 11 W. 3.* 604
8. Under a devise of *all* the devisor's lands to his niece *S. E.* for life, and after that estate determined the same to trustees to preserve contingent remainders; and after her decease, *then* to remain to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail; and for default of such issue, then to the issue of the devisor's four sisters in such manner as he had limited the same to his niece's issue; and for default of such issue or his sisters, to his own right heirs: held, That, as by the limitation of *all* the devisor's lands, which description runs through the subsequent remainders, it was his apparent intent that his estate should go over *altogether*, in default of issue of his niece, to the issue of his four sisters; and again, That no part should go over to his *right heirs* while there remained any issue of his sisters; therefore, the devise is in effect to his niece *S. E.* for life; remainder to her first and other sons successively in tail; remainder to her daughters as tenants in common in tail, with cross remainders (by implication) between those daughters; remainder to the issue of the four sisters of the divisor in tail; and one of the four sisters having issue a son and two daughters, living at the death of the testator; at all events, they took *vested* estates in remainder; and

and whether that son took *conjunctly* with his two sisters in tail, or whether (as the issue of the devisor's four sisters were to take in such manner as was limited to the issue of the niece) *the son* would have taken *first* in tail, with remainder to his two sisters in tail, made no difference in the event, as the son died without issue; and the three other sisters of the devisor and his niece *S. E.* having all died without issue after the death of the devisor: held, That the two surviving daughters of the 4th sister were entitled to *all* the estates against the devisee of the niece, who was the devisor's heir at law. *Roe, on the joint and several demises of Cecilia Wren, and of John Bacon, Clerk, and Isabella his Wife, v. Clayton, T. 45 G. 3.* 628

DISTRESS.

The stat. 42 G. 3. c. 90. s. 61. enables a magistrate to make an order for payment of servants' wages in certain cases; and directs, that in case of *refusal* or non-payment of any sum so ordered for 21 days after such determination, he may issue his warrant of distress; but it gives an appeal to the sessions: held, That 21 days having elapsed between the making of such order before the appeal, and also 21 days after such appeal dismissed before the warrant of distress issued, the magistrate was warranted in issuing such order of distress, without proof of any demand subsequent to the appeal. *Wootton v. Harvey, Clerk, H. 45 G. 3.* 75

DYERS,

See *Lien*, No. 2.

EJECTMENT,

See *Entry*; *Notice to quit*.

1. Where the ancestor died seised, leaving a son and daughter, infants; and on the death of the ancestor, a stranger entered, and the son soon after went to sea, and was supposed to have died abroad, *with-in age*: held, That the daughter was not entitled to 20 years to make her entry after the death of her brother; but only to 10 years,—more than 20 years having in the whole elapsed since the death of the person last seised. *Doe d. George and Frances his Wife v. Jesson, H. 45 G. 3.* 80
2. The lessor of the plaintiff in ejectment, suing in *forma pauperis*, will be dispaupered in case of vexatious delay. *Doe, on the demise of Leppinguell, suing in Forma Pauperis, v. Trussell, E. 45 G. 3.* 505

ENTRY.

1. Where the ancestor died seised, leaving a son and daughter, infants; and on the death of the ancestor, a stranger entered, and the son soon after went to sea, and was supposed to have died abroad, *with-in age*: held, That the daughter was not entitled to 20 years to make her entry after the death of her brother; but only to 10 years,—more than 20 years having in the whole elapsed since the death of the person last seised. *Doe d. George and Frances his Wife v. Jesson, H. 45 G. 3.* 80
 2. A condition against alienation, except to sisters or their children, annexed to a devise to two and their heirs, is good, and for a breach of it by one of them, in levying a fine of her moiety to the use of her husband in fee, the heir of the devisor (the remainder on non-performance of the condition, not passing by a general residuary clause) may enter on such moiety. *Doe d. Gill and Wife v. Pearson, H. 45 G. 3.* 173
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3. One of several co-heirs of the devisor may enter for non-performance or breach of such condition, and recover her own share in ejectment. *Doe d. Gill and Wife v. Pearson*, H. 45 G. 3. 173
4. Where the entry upon claim by one of several coparceners, who make but one heir, is lawful; such entry, made generally, will vest the seisin in all, as the entry of all. *ib.*

ERROR.

Error lies not upon an interlocutory judgment. *Samuel v. Judin in Error*, 3 E. 45 G. 3. 333

ESTOPPEL,

See *Lease*, No. 1.

EVIDENCE,

See *Jurisdiction*, No. 1; *Market Toll*.

1. The presumption of death arises, in the absence of all other evidence, at the end of, seven years from the time when a person was last known to be living. *Doe v. Jesson*, Hil. 45 G. 3. 85
2. In an action by the husband, upon a policy of insurance on the life of his wife, declarations by the wife, made by her when lying in bed, apparently ill, stating that the bad state of her health at the period of her going to *M.* (whither she went a few days before, in order to be examined by a surgeon, and to get a certificate from him of good health, preparatory to making the insurance) down to that time; and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admissible in evidence to shew her own opinion, who best knew the fact of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her

going to *M.* and the day on which such declarations were made; and particularly after the plaintiff had called the surgeon as a witness, to prove that she was in a good state of health when examined by him at *M.*; his judgment being formed in part from the satisfactory answers given by her to his enquiries, and this being but a sort of cross-examination as it were of her. *Aveson v. Lord Kin-naird*, H. 45 G. 3. 188

3. Declarations of a party accompanying an act done, and tending to explain such act, are evidence for the latter purpose, as part of the *res gestæ*. *ib.*
4. The hand-writing of one dead, who was an attesting witness to the supposed execution of a bond, being proved in an action on the bond, *Heath*, J. permitted the defendant to give in evidence, That the deceased had, in his dying moments, acknowledged that he had been concerned in forging the bond—Cited by *Lord Ellenborough*. *ib.* 195
5. Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of *J. W.* it appearing, by competent evidence, that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of *J. W.* who swore to his freehold and place of abode; and that there was no such person; and that the defendant voted on the second day, and was no freeholder; and some time afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid he should be pulled for his *bad* vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of *J. W.*: held, That there was sufficient evidence for the jury to presume that the defendant voted in the name of *J. W.* and consequently to find him guilty of the charge, as alleged in the indictment. *Rex v. Thomas Price*, alias *John Wright*, E. 45 G. 3. 323
6. Though by the stat. 5 G. 2. c. 30. the general plea of bankruptcy and certificate

tificate may be pleaded without averring that the bankruptcy happened *before* the commencement of the suit; yet if it appear at the trial that it happened *afterwards*, it seems that the defendant cannot avail himself of the defence under such a general plea, which is only given by the statute in case any bankrupt, who has conformed to the law, shall *afterwards* be arrested or impleaded for any debt due *before* such time as he became bankrupt. *Tower v. Cameron*, *East*. 45 G. 3. 413

7. Upon an indictment on the stat. 37 G. 3. c. 123. making it felony to administer certain unlawful oaths, where the witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said, That he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words; yet held, That parol evidence of what he in fact said was sufficient, without giving him notice to produce such paper. *Rex v. Moors and others*, *East*. 45 G. 3. 421

8. And where the oath on the face of it did not purport to be for a seditious purpose; yet held, That evidence might be given to shew that *the brotherhood* therein referred to was a seditious society. *ib.* 421

9. Where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. *for two years and a quarter*, ending at Christmas, 1803, the plaintiff held and enjoyed the premises as tenant thereof to A. B. by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar, that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the supposed demise *modo et forma*,—it is sufficient to entitle the defendant to a verdict on such issue, if he prove that the plaintiff held of A. B. from the 23d of Dec. 1801, and to recover for two years, rent only. *Forty v. Imber*, *E.* 45 G. 3. 434

10. A Government storekeeper, resident in

Antigua, transmitting false vouchers to his agent in *London*, who delivered them at the custom-house there, unknowing of the fraud, is indictable in *London*, as if for his own act there. *Rex v. Munton*, sittings after Mich. Term. 1793, cited in *Rex v. Johnson*, J. T. 45 G. 3. 590

EXCESSIVE DAMAGES,

See *New Trial*, No. 1.

EXCISE.

There lies no appeal to the Sessions, from a conviction by two justices, upon the stat 42 G. 3. c. 38. s. 30. for wetting corn in a certain stage of the process of malting; for the clauses of appeal, in former excise laws, to which there is a general reference in this Act, extend not to convictions for *penalties* by two justices. *Rex v. Skone*, T. 45 G. 3. 514

FACTOR,

See *Principal and Factor*.

FELONY,

See *Indictment*, No. 2.

FINE,

See *Condition*, No. 1; *Copyhold*, No. 1.

FIRE INSURANCE.

By a policy, under seal, referring to certain printed proposals, a fire-office insured the defendant's premises from 11th of Nov. 1802, to 25th Dec. 1803, for a certain premium, which was to be paid yearly on each 25th of December; and the insurance

ance was to continue "so long, as the insured should pay the said premium at the said times, and the office should agree to accept it:" and, by the printed proposals, it was stipulated that the insured should make all future payments annually at the office, "within 15 days after the day limited by the policy, upon forfeiture of the benefit thereof; and that no insurance was to take place till the premium were paid;" and by a subsequent advertisement (agreed to be taken as part of the policy) the office engaged, that all persons insured there "by policies for a year or more, had been, and should be, considered as insured for 15 days beyond the time of the expiration of their policies;" yet held, notwithstanding this latter clause, the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise *they would not continue the insurance*; which the assured had refused,—that the office was not liable for a loss, which happened *within 15 days from the expiration of the year* for which the insurance was made, though the assured, *after the loss, and before the 15 days expired*, tendered the full premium which had been demanded. The effect of the whole contract, &c. taken together, being only to give the assured an option to continue the assurance or not during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the *end of the year*, determined the option, by giving notice that they would not renew the contract. *Salvin v. James*, T. 45 G. 3. 571

FORMA PAUPERIS.

The lessor of the plaintiff in ejectment suing in *forma pauperis*, will be dispaupered in case of vexatious delay. *Doe d. Leppingwell*, suing in *Forma Pauperis*, v. *Trussel*, Easter, 45 G. 3. 505

FRAUDS, STATUTE OF.

1. A memorandum signed by the defendants, whereby they agreed to give so much for goods, takes the case out of the 17th sect. of the stat. of frauds, though not signed by the seller, nor expressing any consideration for the defendants' promise, otherwise than by inference from their own obligation. *Egerton v. Matthews*, H. 45 G. 3. 307
2. One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *qu. cl. fregit* against any person entering the close and taking the grass, even with the assent of the owner; but this being a contract of sale of an interest in or concerning land is voidable by the 4th section of the stat. of frauds, 29 Car. 2. c. 3. if not reduced to writing, and may be discharged by parol notice from the owner before any part execution of it. *Crosby v. Wadsworth*, T. 45 G. 3. 602
3. The first section of the statute of frauds as construed by the second, is meant to vacate *parol leases*, &c. conveying a greater interest in land than for three years, and whereon a rent is reserved. *ib.*

FRAUDULENT CONVEYANCE TO DEFEAT CREDITORS.

One, who had a life interest in a settled estate of his wife (both of whom were aged) of at least 3000*l.* a year, whereof the ultimate reversion on failure of issue male (of which there was none) was in her, and having furniture and pictures, &c. in his mansion of not less than 8000*l.* value,—being pressed by his creditors, in pursuance of an agreement with his

his wife, conveyed all that his property to trustees (who had married his two daughters,) for the benefit of his wife and daughters, and subject to his wife's future appointment: in consideration whereof, the wife discharged him of above 3000*l.* before raised on the estate, principally for his use, and enabled the trustees to raise out of her estate 12,000*l.* more for the benefit of her husband's creditors, *but subject to the appointment of him, his executors, &c.*; and also covenanted to levy a fine, which was levied a year afterwards; and the husband covenanted to deliver an inventory of the goods to the trustees within six months; which was not done: and after the conveyance, the husband continued to use the furniture, &c. in the house as before; and was soon afterwards sued by several of the creditors, whose executions against such goods were satisfied by him, without setting up the trust deed, or resorting to the trust fund; but money was raised on it afterwards for other creditors: and above two years after the deed, the husband being sued by the plaintiff, a creditor before that time, the trust deed was set up in bar of the levy upon the goods in the house, and the sheriff returned *nulla bona*; and upon an action brought for a false return, held, That in consideration of the question, Whether this were a *bona fide* transaction, or a contrivance to defeat creditors, and therefore void at common law, or by the stat. 13 *Eliz. c. 5*?—it is material to submit to the jury “the relative value of the property withdrawn from the reach of the creditors, in proportion to the amount of their demands at the time, and the value and tangibility of that substituted in its place,” in aid of the conclusion that the deed was *covenous* against them; and therefore a verdict for the plaintiff, founded principally on these concomitant circumstances: 1. The previous embarrassment of the husband; 2d, The want of notoriety of the conveyance at the time; 3d, The want of an inventory; 4th, The continuance of the husband's possession, though consistent with the deed, yet without notice of the change of property; and, 5th, The appropriation, by the husband,

of a part of the money raised by the trustees to his own use, without objection;—was set aside; and a new trial granted, to bring the question more fully before the Court and jury as to the good faith of the transaction, and the value of the consideration, and its availability to the creditors. *Dewey v. Baynton, Bart. Hil. 45 G. 3.* 257

FREEHOLD.

Things annexed to by Licence.

See *Bridge*, No. 1; *Tresspass*, No. 1.

FREIGHT,

See *Lien*, No. 4.

GREENLAND FISHERY,

See *Impressing*.

HEARSAY,

See *Evidence*, No. 2.

HUSBAND AND WIFE,

See *Evidence*, No. 2;

Fraudulent Conveyance, &c.

1. Where husband and wife entered into a deed with trustees, whereby the husband covenanted with the trustees (to whom certain annuities were transferred, one payable to his wife absolutely, and another for so long a time as she should live with her husband,) That they should apply the first, and an equal annuity in lieu of the second, to be paid by the husband to

to the *separate use* of the wife, in case she should live apart from her husband *with the approbation of the trustees*; and the husband also covenanted, in case of future differences, to permit the wife to live separate from him, if she should, on that account, find it necessary; and the deed contained a clause, that in case of separation *with the approbation of the trustees*, certain of the children should live with and be educated by the wife for a certain period; and that she might visit the others at his house, especially when ill, so as to require *the attention of a mother*; and it also contained other clauses, providing certain things in case of such separation as aforesaid: held, That such a deed did not preclude the husband from maintaining an action against the defendant for an act of adultery, proved to be committed while the wife was *in fact* living apart from her husband; for if there were *no approbation of the trustees to the separation*, which must be taken to be the case, as none was proved, then this was not *such a separation* as the husband consented by the deed, according to the true construction of it: and if the separation were *with the approbation of the trustees*, then the husband, not having given up all claim to the comfort, society, and assistance of his wife (for the interests of the children were provided for as well as the separation of the parents during such approbation,) the case is not brought within the principle of the decision in *Weedon v. Timbrell*; allowing that to be law to the extent of the case there decided. *Chambers v. Caulfield*, *Hil. 45 G. 3.* 244

2. The Court are not restrained from granting a new trial in case of *crim. cor.* for excessive damages if they be satisfied that the jury acted under the influence of undue motives, or of gross error, or misconception of the subject. *ib.*

IMPRESSING.

An apprentice in the *Greenland Fishery* is no otherwise exempted from being impressed than under the general Act of 13 G. 2. c. 17. which exempts all persons from being impressed before the age of 18; and every person who, not having before used the sea, shall bind himself apprentice to serve at sea for the first three years of such apprenticeship. *Ex parte Brocke*, *Hil. 45 G. 3.* 238

INDEMNITY.

The stat. 6 Geo. 2. c. 31. only authorizes parish-officers to take security from the putative father of a bastard child to *indemnify* the parish; and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum, as the amount of the charge actually sustained by the parish: which tender was found for the defendant: held, That the plaintiffs could not recover further upon the note. *Cole and others v. Gower and Piggott*, *Hil. 45 G. 3.* 110

INDICTMENT AND INFORMATION.

See *Conviction, Nuisance.*

1. Threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Fryar's Balsam* without a stamp (which by stat. 42 Geo. 3. c. 36. is prohibited to be vended without a stamped label,) for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence *at common law*, although it be alleged that the money was obtained,—no reference being made to any statute which prohibits such attempt. *Rex v. Southerton*, *Hil. 45 G. 3.* 126

2. But it seems that such an offence is indict-

- indictable upon the stat. 18 Eliz. c. 5. s. 4. for regulating common informers; which prohibits the taking of money, without consent of Court, under colour of process, or *without process*, from any person, upon pretence of any offence against a penal law. *Rex v. Southerton*, Hil. 45 G. 3. 126
3. But no indictment, for any attempt to commit such a *statutable* misdemeanour, can be sustained as a misdemeanour at common law, without at least bringing the offence intended *within*, and laying it to be *against* the statute. *ib.*
4. Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty, and creating the penalty, such an attempt to compound and stifle a public prosecution, for the sake of private lucre, in fraud of the revenue, and against the policy of the statute which gives the penalty as auxiliary to the revenue, and in furtherance of public justice; for example's sake, might also, upon general principles, have been deemed a sufficient ground to sustain the indictment at common law. *ib.*
5. Public officers indicted for enabling accountants with the pay-office to pass false accounts in fraud of the revenue. *Rex v. Bembridge and Powell*, Westminster Sittings after Trin. Term. 1803, cited in *Rex v. Southerton*, Hil. 45 G. 3. 136
6. The Court refused to grant a rule *nisi* for a new trial, after a verdict for the defendant upon an indictment for non-repair of a church-yard fence; which was moved on the ground of the verdict being against evidence. *Rex v. Reynell, Clerk*, E. 45 G. 3. 315
7. The stat. 37 G. 3. c. 123. makes it felony for any person, in any manner or form whatsoever, to administer, &c. any oath purporting or intended to bind the party to engage in any seditious purpose, or to disturb the public peace, or to be of any society, &c. formed for any such purpose, &c. or not to inform or give evidence against any associate, &c.; and by s. 4. it shall not be necessary, in an indictment for any such offence, to set forth the words of the oath; but it shall be sufficient to set forth the purport of it, or some material part thereof: held, That an indictment, charging that the defendants administered to J. H. an oath, "intended to bind him not to inform or give evidence against any member of a certain society, formed to disturb the public peace, for any act or expression of his or theirs," &c. is good, without alleging the *tenor* or *purport* of the oath to be set forth, and without shewing in *what manner* the public peace was meant to be disturbed by such society. *Rex v. Moors and others*, E. 45 G. 3. 419
8. Where the witness, swearing to the words spoken by way of oath by the prisoner, when he administered the same, said, That he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words; yet held, That *parol* evidence of what he in fact said was sufficient, without giving him notice to produce such paper. *ib.* 419
9. Where the oath on the face of it did not purport to be for a seditious purpose, yet held that evidence might be given to shew that the *brotherhood* therein referred to was a seditious society. *ib.*
10. An endeavour to provoke another to commit the misdemeanour of sending a challenge to fight, is itself a misdemeanour indictable; particularly where such provocation was given by writing, containing libellous matter, and alleged in the prefatory part of the indictment to have been done *with intent* to do the party bodily harm, and to break the King's peace; the sending such writing being an act done towards procuring the commission of the misdemeanour meant to be accomplished. *Re v. Phillips*, E. 45 G. 3. 46
11. Where an evil intent accompanying an act is necessary to constitute such a crime, the intent must be alleged in the indictment and proved; though it be sufficient to allege it in the prefatory part of the indictment. But where the act is, in itself unlawful, the law infers a

evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor. *Rex v. Phillips*, E. 45 G. 3. 434

INDORSEMENT ON CANCELLED INSTRUMENT.

See *Ship Register Acts*.

INSOLVENT DEBTORS' ACT.

One who was charged in custody on mesne process, for a sum exceeding 1500*l.* on the 1st of *January*, 1804, is not entitled to be discharged under the Insolvent Debtors' Act of the 44 G. 3. c. 108, though the debt were afterwards reduced by verdict to a sum which, together with the costs, did not amount to 1500*l.* *Ex parte Chiffen*, E. 45 G. 3. 347

INTERLOCUTORY JUDGMENT.

See *Error*, No. 1.

INSURANCE.]

— Of Life,

See *Evidence*, No. 2.

— Against Fire,

See *Fire Insurance*.

1. A policy of insurance on a ship on a certain commercial voyage, *with or without letters of marque*, giving leave to the assured to *chase, capture, and man prizes*, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same

place in sight, of him, and was then endeavouring to escape, will not warrant him, after the capture, and in the course of the further prosecution of the voyage, in *shortening sail and laying to*, in order to let the prize keep up with him, for the purpose of protecting her as a *convoy* into port in order to have her condemned, though such port were within the voyage insured. *Lawrence v. Sydebotham*, *Hil.* 45 G. 3. 45

2. Whether an insurance of a ship, *with or without letter of marque*, upon a certain voyage and commercial adventure from *A.* to *B.* enables her to *chase*, for the purpose of hostile attack, and capture any vessel she may happen to descry in the course of the voyage insured, in whatever direction, or to any limit, and whether known at the commencement of such chasing to be an enemy or not : or whether those words are to be confined to a leave to employ force only for the purpose of *defence* (including a liberty of attack and chase only, as far as they may be fairly supposed to promote ultimate security) must, in the absence of any legal decision as to their construction, depend upon the received practice and known sense of commercial men, if any such received practice there be in the use of them ; and therefore the cause was referred to another trial to ascertain the commercial usage and practice in that respect : but at any rate, such words do not appear to authorize direct *cruising* out of the course of the voyage in search of prize. *Parr v. Anderson*, *Hil.* 45 G. 3. 202
3. Upon an insurance on profits valued at 400*l.* where the plaintiff declared as for a *total loss*, and it appeared that after a shipwreck, by which many of the slaves, on the profits on whom the insurance was made, were lost, but the remainder reached the market, and were sold ; and it did not appear what profit was made of them ; though it was found that the produce of those who were sold did not give a profit upon the whole adventure : held, That the plaintiff was not entitled to recover.—*Note.* The whole adventure was a voyage from *Liverpool* to *Africa*,

Africa, and from thence to the *West Indies*, but the profits were only insured from *St. Vincent's* (after the ship's arrival there) to her last port of discharge in the *West Indies*. *Hodgson v. Glover*, E. 45 G. 3. 316

4. Where a policy described the insurance to be on goods on board the ship "called *The American Ship President*;" this was taken to be all name of the ship, and not a warranty of her being an American ship called *The President*. And where the policy after such name had the words, "or by whatever other name the same ship should be called," it was holden to be no variance that the real name of the ship was *The President*, the identity of the ship meant to be insured with that name being proved. *Le Mesurier v. Vaughan*, E. 45 G. 3. 382
- Hall v. Molineaux*, at *Guildhall*, 1774. cor. *Lee*, C. J. S. P. cited. ib. 385

JOINDER IN ACTION.

1. A count stating that the plaintiff had delivered a note to the defendant, to get it discounted or account with the plaintiff for the money raised on it; and that the defendant received the note for that purpose, but intending to defraud the plaintiff, had not, though requested, accounted with him, &c. is laid in tort (whether formally or not in its frame) and not in *assumpsit*: and no objection can be taken upon a general demurrer to the whole declaration, because such count was joined with a count in trover. *Samuel v. Judin, in Error*, E. 45 G. 3. 333
2. A count upon a promise to the plaintiff, as *administratrix*, for goods sold and delivered by her after the death of the intestate, may be joined with a count upon an account stated with her as *administratrix*; for the damages and costs when recovered would be assets. *Cowell and Wife, Administratrix, v. Watts*, E. 45 G. 3. 405

IRELAND,¹

See *Jurisdiction*.

JURISDICTION.

1. Every plea to the jurisdiction of the court ought to give some other court by which the matter may be tried. Therefore it is not sufficient for a native of *Ireland*, charged with the publication of a libel in *Middlesex*, to plead to the jurisdiction of *B. R.* that *Ireland* before the Union was governed by its own laws, and not by the laws of *Great Britain*; and that since the Union, it is yet governed by its own laws, &c.; and that there always have been and now are courts and jurisdictions in *Ireland*, distinct from those in *G. B.* and competent to the trial of all offences committed by the natives resident there; and that the defendant is a native of and was resident in *Ireland* at the time of the offence alleged; and that the subject matter of the supposed libel related to things in *Ireland*; for the objection, if any, going to the total want of jurisdiction in any of the courts of this part of the kingdom to try the defendant for such an offence, it should either be taken advantage of by plea in bar, or by evidence under the general issue. *Rex v. the Hon. R. Johnson*, T. 45 G. 3. 583
2. A government store-keeper, resident in *Antigua*, transmitting false vouchers to his agent in *London*, who unknowing of the fraud delivered them at the custom-house in *London*, is indictable in *London*, as if for his own act there. *Rex v. Munton*, Sittings after Mich. Term, 1793. 590

JUSTICES OF PEACE, &c.

—Order of,—See *Poor Relief*.

Replevin is not an action within the stat. 24 G. 2. c. 44. s. 6. which protects constables, &c. (and, amongst others, parish officers distraining for a poors' rate), acting under a magistrate's warrant from any

any action, until demand made or left at their usual place of abode, &c. by the party intending to bring such action, &c. *Fletcher v. Wilkins and Others*, *Hil.* 45 G. 3. 283

LAND, SALE OF,

See *Assumpsit*, No. 3.

LANDLORD AND TENANT,

See *Poor Relief*, No. 3.

LEASE.

1. The mere cancelling in fact of a lease is not a surrender of the term thereby granted within the statute of frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law. Nor is a recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, a surrender by deed or note in writing, of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest, though in some instances the acceptance of a second lease for part of the same term before demised may be a surrender of such prior term by operation of law; and this even though the second lease be voidable, if it be not merely void; but where tenant for life with a special power of leasing reserving the best rent, in consideration (as recited) of the surrender of a prior term of 99 years (of which above 50 were unexpired), and certain charges to be incurred by the tenant for repairs and improvements, &c. granted to him a new lease of the premises for 99 years, by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her; which new lease was void by the power for want of reserving the best rent; held, That the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life-estate of the grantor, contrary to the manifest intent of the parties; and consequently that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life: however such second lease might have operated by way of estoppel as against the lessor during her life. *Roe d. The Earl of Berkeley v. The Archbishop of York*, *H.* 45 G. 3. 8
2. *A.* agreed to let her house to *B.* "during her life, supposing it to be occupied by *B.* or a tenant agreeable to *A.*" and "a clause was to be added in the lease," to give *A.*'s son an option to possess the house when of age: held, That this was only an agreement for a lease, and not a perfect lease; the latter clause shewing it to be executory: and that a lease granted in pursuance of such agreement would only inure for the joint lives of *A.* and *B.*: and therefore, that *B.* having continued in possession of the premises under the agreement to the time of his death, his interest then determined; and that *A.* might maintain ejectment against *B.*'s executrix who had possessed herself of the premises. *Doc d. Bromfield v. Smith*, *T.* 45 G. 3. 530

LIBEL,

See *Jurisdiction*, No. 1.

LIEN.

1. The lien of a common carrier for his general balance, however it may arise in

in point of law from an implied agreement to be inferred from a general usage of trade, proved by clear and satisfactory instances sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm, yet it is not to be favoured, nor can be supported by a few recent instances of detention of goods by four or five carriers for their general balance: but such a lien may be inferred from evidence of the particular mode of dealing between the respective parties. *Rushforth and Another, Assignees of B. and W. Rushforth, v. Hadfield, T. 42 G. 3.*

519

2. The dyers at *Halifax* were found by verdict to have no lien for their general balance; and, therefore, the Court held, That they could not retain for the price of dying any other than the particular goods dyed, or at most only for the dying of such goods as were delivered to them at one and the same time under one entire contract; but certainly not for different parcels delivered at several times, which they happened to collect in their hands at one time, and some of which they had afterwards parted with without obtaining payment. *Close and Another, Assignees of Riddell, v. Waterhouse and Others, T. 42 G. 3.*

523

3. A vendor has a general lien for the price of the goods sold while in his possession. *Hanson and Another, Assignees of Wallace and Hawes, v. Meyer, T. 45 G. 3.*

614

And vide *Vendor and Vendee.*

4. One having purchased of the consignee all the tar on board a ship, under two bills of lading, and having obtained delivery from the captain of the greater part of the goods under one of the bills of lading, the captain has a lien on the rest of the tar under the other bill of lading for the freight of the whole: and this, though some of it had been removed into a lighter alongside of the ship sent by the vendee, which the captain afterwards fastened to the ship's side. *Sodergren v. Flight, Guildhall Sittings after*

Trin. 1796, cor. Lord Kenyon, C. J. cited in Hanson v. Meyer.

622

LIFE INSURANCE,

See *Evidence*, No. 2.

LIMITATIONS, STATUTE OF.

See *Action on the Case*, No. 2.

1. Where the ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad within age: held, That the daughter was not entitled to 20 years to make her entry after the death of her brother, but only to 10 years; more than 20 years having in the whole elapsed since the death of the person last seised. *Doe d. George and Frances his wife v. Jesson, H. 45 G. 3.*

80

2. Where the plaintiff complained of a plea of *trespass*; for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost the comfort of her society, &c. against the peace, &c. to his damage, &c.; whether this be *trespass* or *case* (and former authorities have considered it to be *case*,) at any rate a plea of not guilty *infra sex annos* is good on general demurrer. *Macfadzen v. Olivant, E. 45 G. 3.*

387

MALT,

See *Excise*, No. 1.

MANDAMUS,

See *Attorney*, No. 1.

1. Upon affidavits that one of two candidates for an office had a majority only by means of illegal votes, the court granted
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a *mandamus* to the corporation to admit and swear in the other, who appeared upon the affidavits to have the greater number of legal votes: and this, although the first was admitted and sworn into the office; there being no other specific, or at least no other such convenient mode of trying the right. *Rex v. the Corporation of the Bedford Level*, *E.* 45 G. 3 356

2. A *mandamus* lies to the lord and steward of a manor to admit one to a copyhold tenement who has a *prima facie* legal title, in order to enable him to try his right, though equity had before refused to compel the lord to admit him for want of his shewing an equitable right to the property: but if there be a claim of a previous fine due to the lord in respect of the ancestor from whom the party claims, the rule will only be granted on payment of such fine or *finis* as shall be due. *Rex v. Coggan and Another*, *East.* 45 G. 3. 431
3. A similar *mandamus* was just before granted to the Duke of Leeds to admit Mr. Conolly to certain customary tenements in the manor of Wakefield in Yorkshire, to enable him to try his title thereto. *ib.* 432

MARKET-TOLL.

An action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold; alleging that the defendant intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiffs' claim of toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered to the defendant in the same

borough but out of the market; for non constat that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market and there sold. *The Bailiffs, &c. of Tewkesbury v. Diston*, *B.* 45 G. 3. 438

MARQUE, LETTERS OF,

See *Insurance*, No. 1, 2.

MONEY,

See *Stocks*.

NAME.

Where a policy described the insurance to be on goods on board the ship called "*The American ship President*," this was taken to be all name of the ship, and not a warranty of her being an American ship called *The President*; and where the policy after such name had the words, "*or by whatever other name the same ship should be called*," it was holden to be no variance that the real name of the ship was *The President*; the identity of the ship meant to be insured with that name being proved. *Le Mesurier v. Vaughan*, *E.* 45 G. 3. 382
Hall v. Molineaux, at Guildhall in 1774, cor. *Lee C. J.* S. P. cited. *ib.* 385

NAVY AGENTS.

Section 30 of the stat. 31 G. 2. c. 10. which inflicts a penalty of 50*l.* on navy agents demanding, taking, or retaining more

more than 6d. in the pound for receiving and paying over in wages, &c. to any officer, seaman, or other person in the royal navy, and for all their trouble and attendance in relation thereto, is not confined to inferior officers and seamen, as many of the provisions of the statute are; and, therefore, navy agents demanding and receiving of a lieutenant in the navy more than 6d. in the pound upon the sum in fact received and paid over to him by them, though not more than 6d. in the pound upon the whole account of debtor and creditor, including sums drawn for by the lieutenant himself upon the navy-office, and paid and carried to his account by that office, (which is authorized by stat. 85 G. 3. c. 94. making special provision for paying the wages, &c. of commissioned officers,) are liable to the penalty; and the latter Act is not a repeal of the former provision as to the payment of wages, &c. of commissioned officers. *Walsh v. Toulmin*, T. 45 G. 3.

541

NEW TRIAL.

1. The Court are not restrained from granting a new trial in a case of *crim. con.* for excessive damages, if they be satisfied that the jury acted under the influence of undue motives, or of gross error or misconception of the subject. *Chambers v. Caulfield*, H. 45 G. 3.

214

2. The Court refused to grant a rule *nisi* for a new trial after a verdict for the defendant upon an indictment for non-repair of a churchyard fence, which was moved on the ground of the verdict being against evidence. *Rex v. Reynell, Clerk*, E. 45 G. 3.

315

NOTICE TO QUIT.

1. Under an agreement by a tenant of a farm "to enter on the tillage land at *Candlemas*, and on the house and all other the premises at *Lady-day* following, and that when he left the farm he should

quit the same according to the times of entry as aforesaid," and the rent was reserved half-yearly at *Michaelmas* and *Lady-day*: held, That a notice to quit delivered half a year before *Lady-day*, but less than half a year before *Candlemas*, was good; the taking being in substance from *Lady-day*, with a privilege for the incoming tenant to enter on the arable land at *Candlemas* for the sake of ploughing, &c. *Doe d. Strickland v. Spence*, H. 45 G. 3.

120

2. It is said that three months' notice to quit lodgings is sufficient, *per Lord Mansfield, C.J.* in *Throgmorton d. Woodby v. Windpale*, B. R. H. 9 G. 3.

ib.

NUISANCE.

A wagoner occupying one side of a public street in a city, before his warehouses, in loading and unloading his wagons for several hours at a time, both day and night, and having one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot-passengers were incommoded by cumbersome goods lying on the ground on the same side ready for loading, is indictable for a public nuisance, although there were room for two carriages to pass on the opposite side of the street. *Rex v. Russell*, E. 45 G. 3.

427

OATHS, UNLAWFUL,

See *Evidence*, No. 7, 8; *Indictment*, No. 2.

OFFICE AND OFFICER,

See *Deputy*; *Mandamus*, No. 1; *Quo Warranto*, No. 1, 2.

ORDER OF JUSTICES,

See *Poor Relief*.

PARISH and PARISH OFFICERS,

See *Bastard*, No. 1; *Justice of the Peace*,
 &c. No. 1; *Replevin*, No. 1.

PERJURY.

1. Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire in the name of J. W. ; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W. who swore to his freehold and place of abode ; and that there was no such person ; and that the defendant voted on the second day, and was no freeholder : and some time afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid he should be *pulled for his bad vote* ; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W. ; held, That there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W. and consequently to find him guilty of the charge as alleged in the indictment. *Rex v. Thomas Price, alias John Wright*, E. 45 G. 3. 323
2. The punishments directed by the stat. 21 G. 2. c. 18. to be inflicted upon perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, and *cumulative* under the stat. 5. Eliz. c. 9. s. 6. and 2. G. 2. c. 25. s. 2. to which the first-mentioned statute refers. *ib.*

PLEADING.

See *Replevin*, No. 2, *Trespass*.

1. A count stating that the plaintiff had delivered a note to the defendant, to get

it discounted, or account with the plaintiff for the money raised on it, and that the defendant received the note for that purpose ; both intending to defraud the plaintiff, had not, though requested, *accounted* with him, &c. is laid in *tort* (whether formally or not in its frame) and not in *assumpsit* ; and no objection can be taken upon a *general* demurrer to the *whole* declaration, because such count was joined with a count in *trover*. *Samuel v. Judin, in Error*, E. 45 G. 3. 333

2. Debt lies for use and occupation generally, without stating the place where the premises lie, or any of the particulars of the demise. *King v. Fraser, East*, 45 G. 3. 348
3. Where the plaintiff complained of a plea of *trespass*, for that the defendant with force and arms *assaulted and seduced* the plaintiff's wife, *whereby* he lost the comfort of her society, &c. against the peace, &c. to his damage, &c. Whether this be *trespass* or *case* (and former authorities have considered it to be *case*.) at any rate a plea of not guilty *infra sex annos* is good on general demurrer. *Macfadzen v. Olivant*, E. 45 G. 3. 387
4. A declaration, charging that the defendant on *such a day*, and on *divers other days and times*, &c. made an *assault* on the plaintiff, held bad on special demurrer, as *one* assault cannot be laid on *different days*. *English v. Purser*, E. 45 G. 3. 395
5. A count upon a promise to the plaintiff as administratrix, for goods sold and delivered by her after the death of the intestate may be joined with a count upon an account stated with her as administratrix ; for the damages and costs when recovered would be assets. *Cowell and Wife, Administratrix, v. Watts*, E. 45 G. 3. 405
6. The general plea of bankruptcy, and the certificate given by stat. 5 G. 2. c. 30. s. 7. may be pleaded, without averring that the bankruptcy happened *before* the commencement of the suit ; but if it appeared *at nisi prius* that it happened *after* the action brought, it seems that the defendant cannot avail himself of the

the defence under such a general plea, which is only given by the statute in case any bankrupt who has conformed to the law shall *afterwards* be arrested or impleaded for any debt due before such time as he became bankrupt. *Tower v. Cameron, East.* 45 G. 3. 413

7. Where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. for two years and a quarter, ending at *Christmas*, 1803, the plaintiff held and enjoyed the premises as tenant thereof to *A. B.* by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar, that he did not hold and enjoy the premises as tenant thereof to *A. B.* by virtue of the supposed demise *modo et forma*, it is sufficient to entitle the defendant to a verdict on such issue if he prove that the plaintiff held of *A. B.* from the 23d of *December*, 1801, and to recover for two years' rents. *Forty v. Imber, E.* 45 G. 3. 434

8. In *assumpsit* by the vendor against the vendee of land for not accepting it and paying the purchase-money, the plaintiff averred that he was *seised in fee* of the land, and that the defendant agreed to purchase it *on having a good title*, and that his title to the said land *was made good, perfect, and satisfactory to the defendant*, and that he, the plaintiff, had been always *ready and willing*, and *offered to convey* the lands to the defendant, but that the defendant did not pay purchase-money; and, on demurrer, held, That such general allegation of title in the plaintiff, and that his title was *made good and satisfactory to the defendant*, and that the plaintiff was *ready and willing*, and *offered to convey* to the defendant, were a sufficient performance of the agreement on his part to entitle him to recover for a breach of the defendant's part in not paying the purchase-money. *Martin v. Smith, T.* 45 G. 3. 555

9. In declaring upon a contract not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire

consideration for the act, and the entire act or duty which is to be done (including the time, manner, and other circumstances of its performance) in virtue of such consideration; the breach of which act or duty is complained of; but such part of the contract which respects only the liquidation of damages after a right to them has accrued by a breach of the contract, is not necessary to be set forth in the declaration, but is only matter of evidence to be given to the jury in reduction of damages. *Clarke v. Gray, Trin.* 45 G. 3. 564

10. Therefore, *assumpsit* may be maintained in the common form of declaring against a carrier for the loss of goods which were of above 5*l.* value, and were not in fact paid for accordingly; although it were part of the contract, proved by general notice fixed up in the carrier's office and presumed to be known and assented to by the plaintiff that the carrier *would not be accountable for more than 5*l.* for goods, unless entered as such, and paid for accordingly.* *ib.*

11. Every plea to the jurisdiction of the Court ought to give some other Court by which the matter may be tried. Therefore it is not sufficient for a native of *Ireland*, charged with the publication of a libel in *Middlesex*, to plead to the jurisdiction of *B. R.* that *Ireland* before the Union was governed by its own laws, and not by the laws of *Great Britain*, and that since the Union it is yet governed by its own laws, &c.; and that there always have been and now are courts and jurisdictions in *Ireland* distinct from those in *G. B.* and competent for the trial of all offences committed by the natives resident there; and that the defendant is a native of and was resident in *Ireland* at the time of the offence alleged; and that the subject-matter of the supposed libel related to things in *Ireland*; for the objection, if any, going to the total want of jurisdiction in any of the courts of this part of the kingdom to try the defendant for such an offence, it should either be taken advantage of by a plea in bar, or by evidence under the general issue. *Rex v. Johnson, Justice, Trin.* 45 G. 3. 583

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12. In debt on bond, conditioned to perform an award, the plaintiff must assign a breach under the stat. 8 and 9 W. 3. c. 11. and cannot have judgment for the penalty, and take out execution for the single sum awarded, though the measure of damages be ascertained by the award. *Welsh v. Ireland*, T. 45 G. 3. 613

PLEDGE,

See *Principal and Factor*, No. 1.

POOR,

See *Bastard*, No. 1.

POOR-RATE,

See *Replevin*, No. 1.

Under a Local Act, 10 Ann. c. 6. for rating persons to the relief of the poor in *Norwich* for lands, &c. stock, and personal estates in the parish, &c. and money out at interest, they are not liable to be rated for government stocks or funds, which are no more than perpetual annuities, the principal of which can never be recalled by the holder from government, though redeemable at the pleasure of the latter. *Rex v. The Churchwardens and Overseers of the parish of St. John Maldermarket, in Norwich*, Hil. 45 G. 3. 182

POOR RELIEF.

1. An order of two justices founded on the stat. 5 G. 1. c. 8. (for providing for the families of absconding men out of their

estates) should state *how much* of the goods or rents of the fugitive should be seized by the parish officers; and the subsequent order of confirmation by the Sessions should specify the *quantum* of relief to be appropriated out of the goods and rents so seized, and limit a *period* for such appropriation, supposing such *prospective* order to be good, and that the order is not to be confined to the discharge of expences already incurred by the parish. *Stable v. Dixon*, Hil. 45 G. 3. 163

2. And *quære*, if the original order be defective in the particular mentioned, whether the Sessions can make it good by an order of confirmation directing the parish officers "to receive 7l. 16s. rent of the rents and profits," &c. towards the discharge of the parish for providing for the party's wife," &c. *ib.*

3. But, at any rate, a payment of one sum of 7l. 16s. is a sufficient compliance with such order, on the only ground of construction on which it can be supported; and the tenant in whose hands the rent was seized cannot justify, in covenant by his landlord for rent in arrear, the retaining a second sum of 7l. 16s. out of the second year's rent, upon the supposition that such order of Sessions extended to enable the parish officers to receive so much *annually* out of the rents; for in that view the order would be bad in law upon the face of it, as an indefinite order for the annual payment of such a sum, without any limitation of time, or until further order. *ib.*

POWER.

1. The mere cancelling in fact of a lease is not a surrender of the tenant thereby granted, within the statute of frauds, which requires such surrender to be *by deed or note in writing, or by act or operation of law*; nor is a *recital* in a second lease, that it was grounded in part consideration of the *surrender* of a prior lease of the same premises, a surrender *by*

by deed or note in writing of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though in some instances the acceptance of a second lease for part of the same term before demised may be a surrender of such prior term by operation of law; and this even though the second lease be voidable, if it be not merely void; but where tenant for life with a special power of leasing, reserving the best rent in consideration (as recited) of the surrender of a prior term of 99 years (of which above 50 were unexpired) and certain charges to be incurred by the tenant for repairs and improvements, &c. granted to him a new lease of the premises for 99 years by virtue of the power reserved to her, or any other power vested in or in anywise belonging to her, which new lease was void by the power for want of reserving the best rent: held, That the second lease, which was intended and expressly declared to be granted by virtue of and under the power; and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life-estate of the grantor, contrary to the manifest intent of the parties: and consequently that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life, however such second lease might have operated by way of estoppel as against the lessor during her life. *Roe d. The Earl of Berkeley v. The Archbishop of York*, Hilary 45 Geo. 3. 86

2. Where an estate was conveyed to a trustee, *habendum* to him and his heirs, to the use of such persons and for such estate as *W.* should by deed, &c. appoint; and for want of such limitation to the use of *W.* and his heirs: and the same conveyance reserved a certain fee-farm rent to the chief lord, and contained a covenant by *W.* his heirs and assigns for the pay-
Vol. VI.

ment of it: held, That *W.* took a vested fee, liable to be divested by the execution of his power of appointment; and *W.* having contracted to sell the estate afterwards, by indentures of lease and release, to which he and his trustee were parties, after reciting the former conveyance, the trustee, by direction of *W.* did grant, bargain, sell, and release; and *W.* did grant, bargain, sell, alien, release, ratify, and confirm, and also direct, limit, and appoint to the purchaser and his heirs all their estate, title, interest, use, trust, &c. in law and equity, subject to the reserved rent, and to the performance of covenants on the part of *W.* to be performed; and the purchaser also covenanted with *W.* to pay the said rent, and to indemnify and save him harmless: held, That the purchaser took the estate by the appointment of, and not by conveyance from *W.*: the instruments (a lease and release) though more commonly and properly adapted to pass an interest, and containing words of grant for that purpose, yet professing in terms to be an appointment; and the trustee having joined in it by the direction of *W.* which was unnecessary if it had been intended that the purchaser should take an estate derived only out of the interest of *W.*; and it being obviously for the benefit of the purchaser to take by appointment; and such appearing upon the whole to have been the intention of the parties; and held, in consequence, That the defendant (the heir, devisee, and executor of the purchaser) was not liable in covenant for rent in arrears, either as executor or assignee of the land, which was not bound in the hands of *W.*'s appointee by *W.*'s covenant. *Roach v. Wadham*, and the same v. the same, *Executor of Wadham*, II. 45 G. 3. 289

PRACTICE.

1. The granting of day-rules to prisoners in the K. B. prison during term is in the discretion of the Court on application,
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- the same as before *E. 30 G. 3* ; but prisoners upon such day-rules must return at or before 9 o'clock in the evening. *Regula Generalis, H. 45 G. 3.* 2
2. The Court will enter an exonetur on the bail-piece on payment of the sum sworn to and costs, though less than the sum acknowledged to be due, as well where the action is by original as by bill. *Jacob v. Bowes, E. 45 G. 3.* 312
3. An appearance entered after the essoign-day, and before the day of full term, may be entered as of the preceding term ; and, therefore, a *non pros* entered after the second term, for want of declaring before the end of such second term, is good. *Prigmore v. Bradley, E. 45 G. 3.* 314
4. Rule absolute in the first instance for changing the venue from an *English* to a *Welsh* county on the usual affidavit. *Hopkins v. Lloyd, East. 45 G. 3.* and *Hughes v. Hughes, Hil. 45 G. 2.* 355
5. The Court refused to proceed summarily against a steward, who was an attorney, to compel him to account before the Master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and to deliver up upon oath all deeds, writings, &c. relative to the estate ; this being the proper subject of a bill in equity, and not a case for a *mandamus* to compel a steward of a manor to deliver up court-rolls, &c. in lieu of which this summary mode of proceeding has been adopted where the steward of the court is an attorney. *Cocks v. Harman, E. 45 G. 3.* 401
6. Though the venue be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county. *Price, Bart. v. Woodburne, E. 45 G. 3.* 433
7. The lessor of the plaintiff in ejectment, suing in *forma pauperis*, will be dispaupered in case of vexatious delay. *Doe d. Leppingwell, suing in forma pauperis, v. Trussell, E. 45 G. 3.* 505
8. The irregularity of giving a rule to plead before the delivery of the declaration is waved by putting in any plea, though a nullity ; but such inoperative plea having been put in without authority by a new attorney for the defendant, without any order to change the attorney, the judgment which had been signed as for want of a plea was set aside. *Perry v. Fisher, Trin. 45 G. 3* 549
9. Besides the common four-day rule on a defendant in misdemeanour to join in demurrer to his plea, there must be a peremptory rule, giving him a certain day in the discretion of the Court, without which judgment cannot be signed against him. *Rex v. The Hon. R. Johnson, Trin. 45 G. 3.* 383

PRINCIPAL AND FACTOR.

A *factor* cannot pledge the goods of his principal by indorsement and delivery of the *bill of lading*, any more than by the delivery of the *goods* themselves ; though the indorsee knew not that he was factor ; and where goods were consigned on the *joint* account of the consignors and consignee, and the bill of lading was sent to deliver the goods to the consignee or his assigns ; who afterwards indorsed and delivered it to the defendants, upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances : held, That such indorsement and delivery of the bill of lading did not divest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them. *Newsom v. Thornton, Hil. 45 G. 3.* 17

PRISONERS.

The granting of day-rules to prisoners in the K. B. prison during term, is in the discretion of the Court on application, the same as before *East*. 30 G. 3. ; but prisoners out upon such day-rules must return at or before 9 o'clock in the evening. *Regula Generalis*, *Hil.* 45 G. 3. 2

PRIZE.

One of the ships of a squadron is detached by the commanding flag-officer to lie off a certain place within the limits of the station, from whence the captain, *without any further orders* for that purpose, though he has written for such to his superior officer, and waited for them some time, takes upon him *on his own responsibility* (though from laudable motives which were afterwards approved of by the Admiralty) to depart, and to proceed as convoy with the homeward bound trade ; and in the course of the voyage home, out of the limits of his station (but nothing turned on the question of limits) he takes a prize : held, that the superior flag-officer who had before the capture succeeded the one by whom the order for being detached had been originally issued (admitting him to stand in the same situation in point of right) was not entitled to share the flag-officer's share of 1-8th given by the King's proclamation to a flag-officer *directing or assisting* in a capture by a ship under his command. *Sir Henry Harvey, Kat. v. Cooke*, *H.* 45 G. 3. 220

PROMISSORY NOTES,

See *Bills of Exchange*.

PROMOTIONS

In *Hil.* 45 Geo. 3.

On the resignation of *Hotham B.*
Sir T. M. Sutton, Solicitor-General, was made a Baron of the Exchequer, and called Serjeant. 1
Mr. Gibbs, appointed Solicitor-General, and knighted. *ib.*

Mr. Dallas, appointed Chief Justice of *Chester*. 1

Mr. Adam, made Attorney-General to the P. of W. *ib.*

Mr. Jekyll, made Solicitor-General to the P. of W. and King's Counsel. *ib.*

QUO WARRANTO, *Information in Nature of.*

1. The stat. 15 Car. 2. c. 17. creating the corporation of the *Bedford Level*, directs, That they shall appoint a registrar, &c. and other officers at their pleasure ; the duty of which registrar is to register titles to land within the level ; and he takes an oath of office : held, That an information in nature of *quo warranto* does not lie against such an officer ; he being a *mere servant* of the corporation, and his office not affecting any franchise or other authority holden under the crown. *Rex v. The Corporation of the Bedford Level*, *E.* 45 G. 3. 356
2. But an information in nature of *quo warranto* was granted against several for exercising the office of commissioners for paving the town of *Taunton*, under an Act of the 9 G. 3. to whom a power was given to impose rates and taxes on the inhabitants. *Rex v. Badcock and others*, *H.* 22 G. 3. 359

RATE,

See *Poor-Rate*.

RECITAL.

See *Lease*. No. 1.

1. The condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for 12 months," and afterwards stipulating that, "at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account and obey orders," &c. confines the names in the recital. *The Company of Proprietors of Liverpool Water-works v. Atkinson and Harpley*, *Trin.* 45 G. 3. 507

RELIEF,

RELIEF,

See *Poor-Relief*.

RENT,

See *Covenant*, No. 1. *Poor-Relief*,
No. 1, 2, 3.

REPLEVIN.

1. *Replevin* is not an action within the stat. 24 G. 2, c. 44. s. 6, which protects constables, &c. (and amongst other parish officers distraining for a poor's-rate) acting under a magistrate's warrant from any action until demand made or left at their usual place of abode, &c. by the party intending to bring such action, &c. *Fletcher v. Wilkins and others*, H. 45 G. 3. 283
2. Where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. *for two years and a quarter, ending at Christmas, 1803*, the plaintiff held and enjoyed the premises as tenant thereof to A. B. by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the supposed demise *modo et forma*: it is sufficient to entitle the defendant to a verdict on such issue if he prove that the plaintiff held of A. B. from the 23d of Dec. 1801, and to recover for two years' rent. *Forty v. Imber*, E. 45 G. 3. 434

RIVER WATER.

The owner of land through which a river runs cannot by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other land-owner or lower down the river, who had, at any time before such enlargement, appropriated to himself the surplus which did not escape by the former channel. *Bealey v. Shaw*, H. 45 G. 3. 208

SALE OF GOODS.

A memorandum signed by the defendants, whereby they agreed to give so much for goods, takes the case out of the 17th sect. of the statute of frauds, though not signed by the seller, nor expressing any consideration for the defendants' promise, otherwise than by inference from their own obligation. *Egerton v. Matthews and another*, H. 45 G. 3. 307

SALE OF LANDS,

See *Assumpsit*, No. 3.

SAMPLE,

See *Market*.

SCIRE FACIAS,

See *Bond*, No. 2.

SEISIN,

See *Entry*, No. 4.

SEPARATE MAINTENANCE,

See *Husband and Wife*, No. 1.

SERVANTS' WAGES,

See *Distress*, No. 1.

SESSIONS,

See *Appeal*. *Poor-Relief*.

SETTLEMENT OF ESTATE,

See *Fraudulent Conveyance to defeat Creditors*.

SETTLEMENT CERTIFICATE.

Where the son of a certificated person (not named in the certificate otherwise than under the general appellation of the father's family) marries and lives in a house of his own in the certified parish, he ceases to be under the protection of the certificate as part of his father's family; and an apprentice may gain a settlement by serving such person in the certificated parish. *Rex v. The Inhabitants of Mortlake*, L. 45 G. 3. 397

SHIP

SHIP REGISTER ACTS.

An indorsement of a transfer of a ship in the same port made upon the certificate of the registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after such certificate had been delivered up and cancelled, and had remained dormant during all the intermediate time; held, not to convey a title to the ship under the Register Act. 34 G. 3. c. 68. s. 15. and other Acts; such certificate having been so cancelled and delivered up upon occasion of the vendee's obtaining a register *de novo* (issued without authority) which recited the cancellation of the former certificate. For the object of the Register Acts in requiring such indorsement is in order to notify the change of property to the public; and therefore it is required to be made on an existing acknowledged certificate in use at the time: and consequently no title passed to the assignees of the vendee, who had become bankrupt between the time of the original transfer to him and the signing of such indorsement by the vendor, the vendee having also, before his bankruptcy, conveyed away the ship to third persons for a valuable consideration, who were in possession of it. But *quære*, Whether any title could be made under such register *de novo*, issued without authority upon a transfer of the ship in the same port? And therefore the vendees of the bankrupt only held their possession on such defect of title in the assignees of the bankrupt. *Moss and another, Assignees of Kirkpatrick, a Bankrupt, Survivor of Parr, v. Mills and Boon, H. 45 G. 3.* 144

STEWARD,

See *Attorney*, No 1.

STOCKS,

Not rateable to the poor *as money out at interest* under 10 Ann. c. 6. for rating the city of *Norwich*. *Rex v. The Churchwardens, &c. of St. John, Madder-market, in Norwich, H. 45 G. 3.* 182

STATUTES,

ELIZABETH.

- | | |
|---|-----|
| 13. c. 5. (Fraudulent Conveyances) | 257 |
| 18. c. 5. s. 4. (Regulating Common Informers) | 126 |

JAMES I.

- | | |
|------------------------------------|---------|
| 21. c. 16. (Limitation of Actions) | 80, 388 |
|------------------------------------|---------|

CHARLES II.

- | | |
|--|-----|
| 12. c. 24. (Excise) | 515 |
| 15. c. 17. (<i>Bedford Level</i>) | 356 |
| 29. c. 3. s. 3. (Stat. of Frauds; Surrender and Cancelling Deed) | 86 |
| — s. 17. (Memorandum of Agreement) | 307 |

WILL. & MARY, and WILL.

- | | |
|--|-----|
| 7 & 8. c. 22. (Ship Register) | 147 |
| 8 & 9. c. 11. (Assigning Breaches on Bond) | 550 |
| 8 & 9. c. 30. (Settlement; Certificate) | 401 |

ANNE.

- | | |
|---------------------------------------|-----|
| 10. c. 6. (Rating in <i>Norwich</i>) | 182 |
|---------------------------------------|-----|

GEO. I.

- | | |
|------------------------|-----|
| 5. c. 8. (Poor Relief) | 163 |
|------------------------|-----|

GEO. II.

- | | |
|--|--------|
| 5. c. 30. (Bankrupt; Plea) | 413 |
| 6. c. 31. (Bastard; Parish Indemnity) | 110 |
| 9. c. 36. (Charitable Uses) | 328 |
| 11. c. 19. s. 22. (Avowry) | 437 |
| 13. c. 17. (Impressing) | 238 |
| 18. c. 18. (Election; Perjury) | 323, 7 |
| 24. c. 44. s. 6. (Constable, &c.; Demand of Warrant) | 283 |
| 30. c. 24. (Threatening Letters) | 131 |
| 31. c. 10. (Navy Agents) | 541 |
| | Geo. |

AN INDEX TO THE PRINCIPAL MATTERS.

GEO. III.

9. c. 15. (Fisheries ; Impressing)	240
19. c. 56. (Auction Duty)	392
26. c. 41. (Greenland Fishery ; Impressing)	238
26. c. 60. (Ship Register)	147
28. c. 37. (Auction Duty)	392
29. c. 53. (Greenland Fishery ; Impressing)	239
33. c. 66. (Prize Distribution)	230
34. c. 68. s. 15. (Ship Register)	144
35. c. 94. (Navy Pay)	541
37. c. 123. (Unlawful Oaths)	419
39 & 40. c. 106. (Unlawful Agreements)	417
42. c. 38. (Excise ; Malt ; Appeal)	514
42. c. 56. (Stamps)	126
42. c. 90. (Servants' Wages ; Distress ; Appeal)	75
43. c. 73. s. 4. (Stamp Prosecutions)	138
44. c. 108. (Insolvent Debtors' Act)	347

STOPPING IN TRANSITU.

See *Principal and Factor*. No. 1.

B. a trader in *London* ordered goods to be shipped to him by *D.* and *Co.* his correspondents at *Dantzick*, who were to draw for the amount on *F.* at *Hamburgh* (who had agreed to accept the bills upon receiving commission on the amount ;) and the bills of lading and invoices were to be transmitted by *D.* and *Co.* from *Dantzick* to *F.* at *Hamburgh*, who was to forward them to *B.* in *London* ; and *F.* accordingly accepted the bills of exchange drawn upon him, and on the receipt of the bills of lading transmitted the same (which were made out to the order of the shippers, and not indorsed) to *B.* in *London*, who received them together with the invoices and letters of advice, five days after an act of bankruptcy committed by him. *F.* also became bankrupt, and the bills of exchange drawn on him by *D.* and *Co.* were obliged to be taken up and paid by themselves ; held, 1st, That *F.* had no right to stop the goods *in transitu* ; being no more than a *surety for the price*, and not *vendor or consignor* ; 2dly, That one who

was general agent of *F.* in *London*, having obtained the bills of lading from the bankrupt after his bankruptcy, *upon an agreement* when the goods arrived "to dispose of them, and to apply the net proceeds to the discharge of such bills as had been drawn against the goods," had no authority to retain the proceeds against the assignees of *B.* the bankrupt, either in respect of *F.* or in respect of a stopping *in transitu* on behalf of *D.* and *Co.* the shippers, who after his possession of them, and after trover commenced by *B.'s* assignees for the value, sent a letter to him approving of his having obtained possession of the bills of lading and the goods ; for, at any rate, there was no *adverse* stopping *in transitu*, but the goods were obtained by *agreement* with the vendee after his bankruptcy, even if the defendant could be considered as agent for the shippers at the time by relation. *Siffken and Fieze, Assignees of Brown, a Bankrupt, v. Wray, East.* 45 G. 3. 371

SURETY.

See *Bond*, No. 1.

SURRENDER.

1. The mere cancelling in fact of a lease is not a surrender of the term thereby granted within the statute of frauds, which requires such surrender to be *by deed or note in writing*, or *by act or operation of law* ; nor is a recital in a second lease, that it was granted in part-consideration of the surrender of a prior lease of the same premises, a surrender *by deed or note in writing* of such prior lease ; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest, though in some instances the acceptance of a second lease for part of the same term before demised may be a surrender of such prior term by operation of law ; and this even though the second lease be voidable, if it be not merely void ; but where tenant for life with a special power of leasing, reserving the best rent, in consideration (as recited) of the

the surrender of a prior term of 99 years (of which above 50 were unexpired) and certain charges to be incurred by the tenant for repairs and improvements, &c. granted to him a new lease of the premises for 99 years, by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her; which new lease was void by the power for want of reserving the best rent; held, That the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life-estate of the grantor, contrary to the manifest intent of the parties, and consequently that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life, however such second lease might have operated by way of estoppel as against the lessor during her life. *Roe d. The Earl of Berkeley v. The Archbishop of York, H. 45 G. 3.* 86

TENANTS IN COMMON.

Devises of a copyhold, holding as tenants in common, have several estates to which they must be severally admitted, and for which several services are due to the lord, and several heriots on the death of each tenant; and the multiplication of heriots and fees on admission still continues, notwithstanding the re-union of the same land afterwards in one person; the divided estates or interests in the land, once divided in severalty, continuing several. *Altree v. Scutt, E. 45 G. 3.* 476

THREAT AND THREATENING LETTERS.

See Indictment, No. 1, 2, 3, 4.

TITLE TO LAND,

See Assumpsit, No. 3.

TOLL,

See Market.

TRESPASS.

1. *A. grants liberty, licence, power, and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll. The property in the materials of the bridge, when built and dedicated to the public, still continues in B. subject to the right of passage by the public; and when severed and taken away by a wrong-doer, he may maintain trespass for the asportation.* *Harrison v. Parker, H. 45 G. 3.* 154

2. *One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *qu. cl. fregit* against any person entering the close and taking the grass, even with the assent of the owner.* *Crosby v. Wadsworth, T. 45 G. 3.* 602

TROVER.

See Joinder in Action, No. 1; Trespass, No. 1.

Taking the property of another by assignment, from one who had no authority to dispose of it, as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker, who had purchased it there in his own name for his principal, and refusing to deliver it to the principal after notice and demand by him, none other than the person in whose name it is warehoused being able to take it out, is a conversion. *M'Combie v. Davies, T. 45 G. 3.* 539

UNLAWFUL.

UNLAWFUL OATHS,

See *Evidence*, No. 7, 8;
Indictment, No. 2.

USE AND OCCUPATION,

See *Debt*, No. 1.

VARIANCE,

See *Conviction*, No. 1;
Insurance, No. 4.

VENDOR AND VENDEE,

See *Stopping in Transitu*.

— Of Land,

See *Assumpsit*, No. 3.

Under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much *per cwt.* by bill at two months; which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and 14 days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to *weigh and deliver* to the vendee *all his starch*: held, That, under this contract, the absolute property in the goods did not vest in the vendee *before the weighing*, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse in the name and at the expence of the vendor. *Hanson and another, Assignees of Wallace and Hawes, Bankrupts, v. Meyer, Trins.* 45 G. 3.

614

VENUE,

See *Jurisdiction*, No. 1.

1. Rule absolute, in the first instance, for changing the venue from an *English* to a *Welsh* county, on the usual affidavit. *Hopkins v. Lloyd*, E. 45 G. 3. and *Hughes v. Hughes*, Hil. 40 G. 3. 355
2. Though the venue be charged by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county. *Price, Bart. v. Woodburn*, E. 45 G. 3. 433
3. A Government store-keeper, resident in *Antigua*, transmitting false vouchers to his agent in *London*, who delivered them at the custom-house there, unknowing of the fraud, is indictable in *London*, as if for his own act there. *Rex v. Munton*, Sittings after *Mich. Term*, 1793, cited in *Rex v. Johnson*, J. T. 45 G. 3. 590

VESTED ESTATE,

See *Conveyance*, No. 1;
Devise, No. 5.

VIDELICET,

See *Evidence*, No. 9.

WAGES,

See *Distress*, No. 1.

WARRANTY IMPLIED,

See *Assumpsit*, No. 2: or,
Auctioneer, No. 1.

